In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the policy of the United States Government not to accept immigrant visa applications from Vietnamese migrants who have been determined not to be refugees until they return to their country of origin violates 8 U.S.C. 1152(a)(1), which provides that no person shall be discriminated against in the issuance of an immigrant visa because of that person's nationality.

2. Whether a court may review the decision not to process an immigrant visa application based on consular venue considerations.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States Department of State, Bureau of Consular Affairs; Warren Christopher, Secretary of State; Mary A. Ryan, Assistant Secretary of State for Consular Affairs; Donna Hamilton, Deputy Assistant Secretary of State for Consular Affairs; Richard Mueller, Consul, Consulate General of the United States in Hong Kong; and Wayne Leininger, Chief of the Consular Section, Consulate General of the United States in Hong Kong. Petitioners were defendants in the district court and appellees in the court of appeals. All individual petitioners appear in their official capacities only. Matthew Victor, who was also a defendant-appellee below in his official capacity as Refugee Officer, Consulate General of the United States in Hong Kong, no longer holds that position, which has been abolished; the responsibilities of the position have been distributed among several other officials.

Respondents, who were plaintiffs-appellants below, are Legal Assistance for Vietnamese Asylum Seekers, Inc. (LAVAS); Thua Van Le; Em Van Vo; Thu Hoa Thi Dang; and Truc Hoa Thi Vo.

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The Solicitor General, on behalf of the United States Department of State, Bureau of Consular Affairs, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the district court denying a temporary restraining order (App., *infra*, 19a-21a) is unpublished. The order of the court of appeals entering a preliminary injunction (App., *infra*, 22a-23a) is unpublished. The order of the district court granting summary judgment to petitioners (App., *infra*, 24a-28a) is unpublished. The opinion of the court of appeals from which review is sought, which reversed

the district court's grant of summary judgment to petitioners and remanded for further proceedings (App., *infra*, 1a-18a), is reported at 45 F.3d 469. A subsequent order of the court of appeals directing a limited remand on the issue of mootness (App., *infra*, 29a-30a) is unpublished. The opinion of the district court on that limited remand, concluding that the case was moot and dismissing the case (App., *infra*, 31a-38a), is reported at 909 F. Supp. 1. The opinion of the court of appeals reversing the district court's mootness ruling, remanding for further proceedings, and denying the government's petition for rehearing (App., *infra*, 39a-49a), is not reported. The order of the court of appeals rejecting petitioners' suggestion of rehearing en banc (App., *infra*, 50a-51a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1995. App., *infra*, 1a. A petition for rehearing was denied on February 2, 1996. App., *infra*, 39a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 202(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1152(a)(1), provides:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

2. Section 222(a) of the Immigration and Nationality Act, 8 U.S.C. 1202(a), provides in part that "[e]very alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed."

STATEMENT

This case concerns the application of Section 202(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1152(a)(1), which, among other things, prohibits discrimination on the basis of nationality in the issuance of visas. This case also presents a threshold question under the doctrine of consular nonreviewability, which generally precludes courts from reviewing the decisions of United States consular officials not to grant visas to aliens residing abroad. The issues in this case are closely related to those in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.), which the court of appeals recently agreed to hear en banc. See App., *infra*, 74a-75a. The court of appeals has declined, however, to vacate the judgment in this case pending its en banc ruling in *Lisa Le*, or to stay its mandate beyond March 21, 1996. *Id.* at 54a-55a.[1]

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[1] In this petition, we refer to this case as *LAVAS*, and to the companion case as *Lisa Le*. Counsel for the parties are the same in both cases. Some of the materials referred to in this petition are in the record in the *Lisa Le* case but not this case. "*LAVAS* C.A. App." refers to the joint appendix filed by the parties in the court of appeals in this case, and "*Lisa Le* C.A. App." refers to the joint appendix filed by the parties in the court of appeals in the *Lisa Le* case. "Gov't C.A. Br. Addendum" refers to the addendum to the appellate brief filed by the

1. a. During the 1980s, a combination of political and economic circumstances in Vietnam and the prospect of resettlement in another country, particularly the United States, induced many Vietnamese nationals to migrate to other countries in Southeast Asia. The resources of the countries where those migrants first landed had already been strained by large migrations from Vietnam, Laos, and Cambodia; for example, more than 750,000 Vietnamese nationals alone have migrated to other countries in Southeast Asia. Because of the substantial migration, some countries began to turn back migrant "boat people," which often resulted in tragic loss of life at sea. *LAVAS* C.A. App. 186-193.

To defuse the migration crisis, to protect those migrants who genuinely feared political persecution, and to avoid further loss of life, some 50 countries, including the United States, Vietnam, and Hong Kong, entered in 1989 into a multinational initiative, the Comprehensive Plan of Action (CPA).[2] The CPA establishes an internationally coordinated system for screening Vietnamese and Laotian migrants for legitimate claims of refugee status, and is designed to deter dangerous and uncontrolled economic migration in Southeast Asia. Under the CPA, Vietnamese and Laotian migrants are permitted to land and are "screened" under international standards to determine whether they are refugees (*i.e.*, whether they

government in this case. We have lodged copies of both joint appendices and the addendum with the Clerk of this Court.

[2] The CPA's text is reprinted as an addendum to the government's court of appeals brief in this case, and also at *Lisa Le* C.A. App. 189-193. Although the United States as a matter of foreign policy adheres to the terms of the CPA, it does not have formal status under United States law.

have a well-founded fear of persecution).[3] Those found to qualify as refugees ("screened-in") are permitted to seek resettlement in a third country. CPA § II.E.2 (Gov't C.A. Br. Addendum); *LAVAS* C.A. App. 187.

A central tenet of the CPA is that a migrant found ineligible for refugee status must return to his or her country of origin. The agreement of the CPA's participants that "screened-out" migrants will be repatriated was essential in persuading reluctant countries to permit migrants to land and attempt to establish their claims to refugee status, rather than turn them back to sea. *LAVAS* C.A. App. 188-190. The CPA requires that "every effort will be made to encourage the voluntary return" of screened-out migrants, but it does not prohibit Hong Kong from involuntarily repatriating them. Today, approximately 20,000 screened-out Vietnamese migrants remain in Hong Kong. *Id.* at 189, 190, 192, 273-274; CPA § II.F (Gov't C.A. Br. Addendum). The treatment of migrants returning to Vietnam is extensively monitored by the United Nations High Commissioner for Refugees (UNHCR), who has found that the "vast majority of returnees" face "no

[3] Pursuant to the CPA, the migrants are screened under criteria established by the United Nations High Commissioner for Refugees (UNHCR) based upon the 1951 United Nations Convention Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6259, 6261-6264. In Hong Kong, the migrant asylum seeker is screened by Hong Kong authorities under UNHCR standards to determine whether the migrant has a well-founded fear of persecution. If the migrant is found not to qualify as a refugee, he or she may appeal to the Refugee Status Review Board, an independent body established under the CPA. If the Board finds that the migrant does not qualify as a refugee, the migrant may appeal further to the UNHCR. *LAVAS* C.A. App. 87-88.

protection problems whatsoever." *UNHCR Monitoring of the Repatriation and Reintegration of CPA Returnees to Vietnam* (Hanoi 1995) (*Lisa Le* C.A. App. 446); see also *LAVAS* C.A. App. 97, 290.

b. A number of Vietnamese nationals who migrated to Hong Kong applied for immigrant visas to the United States. Prior to April 1993, the United States Consulate General in Hong Kong processed the immigrant visa applications of migrants before they were screened under the CPA, and sometimes even after they were screened out. *LAVAS* C.A. App. 90-92. That processing (which was resumed for a short period after February 1994) provoked objections from the UNHCR and other signatories to the CPA. They maintained that processing by United States officials of screened-out migrants for direct resettlement in the United States from countries of "first asylum" such as Hong Kong would undermine the CPA process, by deterring voluntary repatriation and inducing further migration. See *id.* at 191; Affidavit of Charles Sykes, Deputy Assistant Secretary of State ¶¶ 5-7 (June 15, 1995) (*Lisa Le* C.A. App. 217-218).

Taking into account those objections and the impact of such processing on voluntary repatriation, the State Department adopted a firm, prospective policy (effective December 1, 1994) against processing any new immigrant visa applications of screened-out migrants until they return home. Sykes Aff. ¶¶ 6-8 (June 15, 1995) (*Lisa Le* C.A. App. 217-218). At the February 1995 annual meeting of the steering committee of governments participating in the CPA, the United States joined the UNHCR and other CPA participants in reaffirming their commitment to that process, including voluntary repatriation of the

migrants. The consensus statement adopted by the steering committee explicitly included a commitment by the United States not to consider screened-out Vietnamese migrants for resettlement until they return to Vietnam. Sykes Aff. ¶ 8 (June 15, 1995) (*Lisa Le* C.A. App. 218); see also Affidavit of Charles Sykes ¶ 5 (Feb. 16, 1996) (filed in court of appeals in support of stay in *Lisa Le*) (lodged with the Clerk of this Court).

In February 1996, the British Foreign Minister appealed to Secretary of State Warren Christopher for a "clear statement" by the CPA steering committee "that the remaining migrants should now go back to Vietnam." Sykes Aff. ¶¶ 8-9 (Feb. 16, 1996). On March 6, 1996, the United States joined another consensus statement of the CPA steering committee, once again reaffirming that Vietnamese migrants found not to be refugees should return to Vietnam.[4] The consensus statement notes that the CPA, including the requirement of repatriation of persons found not to be refugees, has effectively brought the crisis created by the dangerous and clandestine migration at sea to a halt. The consensus statement also observes that the CPA will formally come to an end on June 30, 1996. It further notes an earlier statement by the members of the Association of South East Asian Nations (ASEAN) that repatriation should be completed as soon as possible, and that "there should be no other actions or other new initiatives which will interrupt or adversely affect

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[4] A copy of the March 6, 1996, consensus statement has been lodged with the Clerk and provided to counsel for respondents.

the CPA implementation, particularly repatriation, as in the past."[5]

In the case of Vietnamese nationals who return to Vietnam, immigrant visa applications are processed in Vietnam pursuant to the Orderly Departure Program (ODP). The ODP is a major emigration program established by the United States and Vietnamese governments, by which more than 410,000 Vietnamese nationals have been resettled in the United States directly from Vietnam. Sykes Aff. ¶ 14 (*Lisa Le* C.A. App. 219-220); see also *LAVAS* C.A. App. 191-192. Processing and approval of a visa application through the ODP after a migrant's return takes approximately three to six months; because of other exit formalities, the total time from a migrant's return to Vietnam until his or her exit under the ODP may be six to twelve months. *Id.* at 192, 274. Vietnam has not impeded the orderly departure from Vietnam of repatriated migrants. *Id.* at 113, 192, 299-301.

2. This action was brought in the United States District Court for the District of Columbia on February 25, 1994, to challenge the United States

[5] See Consensus Statement (Mar. 6, 1996); Sykes Aff. ¶ 7 (Feb. 16, 1996). The members of ASEAN are Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam. Hong Kong, which currently has the status of a Crown Colony of the United Kingdom, is not a member of ASEAN. As of July 1, 1997, Hong Kong will be administered by the People's Republic of China. The UNHCR has undertaken to "make other appropriate arrangements with the aim of completely solving the Vietnamese boat people problem in Hong Kong as soon as possible after 30 June 1996 so as to enhance the success of the CPA." See Consensus Statement (Mar. 6, 1996).

Government's policy against processing visa applications of screened-out migrants until they return home. The plaintiffs (respondents in this Court) are a non-profit legal rights organization (LAVAS), two screened-out Vietnamese nationals who migrated from Vietnam to Hong Kong (Ms. Thu Hoa Thi Dang and Ms. Truc Hoa Thi Vo), and the individual migrants' sponsors in the United States.[6] Pursuant to the CPA, Ms. Dang and Ms. Vo had been screened by Hong Kong authorities under international standards, and had been found not to be refugees. They had then sought to apply for immigrant visas to the United States. Each was informed by a consular officer at the United States Consulate General in Hong Kong that, because she had been found not to be a refugee, she could not apply for an immigrant visa in

[6] Ms. Dang's sponsor is her husband, Thua Van Le, a United States citizen. *LAVAS* C.A. App. 65. Ms. Vo's sponsor is her father, Em Van Vo, also a United States citizen. *Id.* at 198. Ms. Dang and Ms. Vo have sought to gain the benefit of a provision of the INA that gives an immigration preference to close relatives of United States citizens. See 8 U.S.C. 1151(b)(2)(A)(i) and 1153(a)(1). A sponsoring citizen must first file a petition to have the relative alien accorded an eligible classification. See 8 U.S.C. 1154; 8 C.F.R. 204.1(a). If the Immigration and Naturalization Service (INS) approves the petition, the alien must then submit an application for an immigrant visa to the designated consular office of the Department of State. 22 C.F.R. 42.61(a). The applicant must provide various documents to the consular office and must appear at the consulate for final processing of the application, including an interview by a consular officer. 8 U.S.C. 1202(a); 22 C.F.R. 42.62 *et seq.*

Hong Kong but could apply only in her country of origin. *LAVAS* C.A. App. 85, 210.[7]

The district court granted the government's motion for summary judgment. App., *infra*, 24a-28a. The district court rejected respondents' contention that the government's policy concerning screened-out migrants violated a Department of State regulation, 22 C.F.R. 42.61(a) (1993), which at the time provided that, "[u]nder ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides." The court accepted, as a policy choice entitled to deference, the State Department's determination that "the situation of the detained Vietnamese asylum-seekers in Hong Kong is not an 'ordinary circumstance.'" App., *infra*, 27a (footnote omitted). Accordingly, it concluded that "the failure to process the immigrant visa applications of Vietnamese asylum-seekers denied refugee status in Hong Kong does not violate the INA and the regulations promulgated thereunder." *Id.* at 28a.

3. A divided panel of the court of appeals reversed and remanded. App., *infra*, 1a-18a. As an initial matter, the majority held that the migrant plaintiffs' relatives in the United States had a right under the Administrative Procedure Act (APA), 5 U.S.C. 702, to

[7] As the court of appeals noted, Ms. Dang has been granted an immigrant visa to the United States; the case is therefore moot as to her and her sponsor. App., *infra*, 42a. The court of appeals concluded, however, that the case is not moot as to Ms. Vo and her sponsor. The United States Consulate General in Hong Kong denied Ms. Vo's visa application, but, because of the basis for that denial, the court reasoned that she is "free to file another application." *Id.* at 46a. We do not seek review of that ruling.

bring an action to require that the migrants' visa applications be accepted in Hong Kong. The majority therefore declined to consider whether the migrant plaintiffs themselves or LAVAS has a right of judicial review. App., *infra*, 5a-6a.

On the merits, the majority rejected respondents' claims based upon the State Department regulation (App., *infra*, 7a-8a),[8] but it held (*id.* at 8a-12a) that the policy of not processing applications submitted by screened-out Vietnamese migrants in Hong Kong violates Section 202(a)(1) of the INA. That Section provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's * * * nationality." 8 U.S.C. 1152(a)(1). The court held that petitioners had violated that provision in drawing what it believed to be "an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants." App., *infra*, 9a. The court declined to defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), to the contrary administrative interpretation of Section 202(a)(1), because it

[8] The regulation was amended effective September 6, 1994. 59 Fed. Reg. 39,955 (1994). It now provides that, "[u]nless otherwise directed by the [State] Department," an alien applying for an immigrant visa shall present the application at the consular office having jurisdiction over the alien's place of residence, or (if the alien has no residence) at the consular office where the alien is physically present. 22 C.F.R. 42.61(a). The court of appeals noted that the State Department has exercised its authority to "direct otherwise" with respect to the venue for processing visa applications by screened-out Vietnamese migrants in Hong Kong. App., *infra*, 8a.

found that Section to be unambiguous on the point. App., *infra*, 11a.[9]

Judge Randolph dissented. App., *infra*, 13a-18a. He first noted that "[t]he potential repercussions of the majority's decision are, to say the least, disquieting. The flight of illegal aliens to Hong Kong and elsewhere has created an international crisis. Fifty nations have sought to avert the flood by stopping the flow. Not processing their visas in Hong Kong removes one of the reasons so many of these people are leaving their homeland and embarking on the dangerous journey across the South China Sea." *Id.* at 14a. Judge Randolph then concluded that "[t]he so-called 'discrimination' the majority detects stems from the illegal status of the screened out boat people, rather than from the fact (if it is a fact) that they are all Vietnamese nationals." *Id.* at 15a. He reasoned that the government's policy with respect to screened-out migrants in Hong Kong "is not discrimination on the basis of nationality, but discrimination on the basis of legality. And the statute does not forbid it." *Ibid.*

4. The government filed a petition for rehearing and suggestion of rehearing en banc. After a limited remand for proceedings on the issue of mootness, the panel concluded that the case was not moot and denied rehearing. App., *infra*, 39a-46a. The panel again remanded the case to the district court for class certification proceedings. *Id.* at 47a.

[9] The majority stated that the INA is committed to the administration of the INS, and that it is an INS interpretation that is at issue here. App., *infra*, 11a. In fact, the particular visa provisions at issue are administered by the Secretary of State and consular officers, and it therefore is the Secretary's interpretation that is at issue (and that is entitled to deference under *Chevron*), absent a controlling interpretation by the Attorney General. See 8 U.S.C. 1103.

Judge Randolph dissented from the denial of rehearing. He noted that "further doubts have been raised about the majority's interpretation" of Section 202(a)(1). App., *infra*, 49a. He pointed out that, in the companion *Lisa Le* case, the government argues that Section 202(a)(1) governs only the issuance of visas, not "where visa applications must be processed," App., *infra*, 49a, and that consular venue determinations are, in any event, "entrusted entirely to the Secretary of State," *ibid.* Those arguments were also presented in the government's petition for rehearing and suggestion of rehearing en banc (at pages 5-6 and 10-13) in this case. The full court of appeals nonetheless rejected the government's suggestion of rehearing en banc, with four judges dissenting. App., *infra*, 50a-51a.

5. While the government's rehearing petition in this case was pending in the court of appeals, a separate action (known as the *Lisa Le* case) was filed in district court by another screened-out Vietnamese migrant in Hong Kong and her sponsor in the United States. Those plaintiffs' cases became moot after the United States Consulate General in Hong Kong processed the migrant's visa application (as required by a preliminary injunction issued by the district court, which the court of appeals refused to stay) and granted her an immigrant visa. Twenty-five more screened-out migrants and their 25 sponsors entered the second action as additional plaintiffs. On March 1, 1996, the district court granted summary judgment for all but two of those additional plaintiffs (who were denied intervention), reasoning that the case was, "in

all relevant respects, identical to *LAVAS*." App., *infra*, 70a. The court permanently enjoined petitioners from "implementing their decision to decline processing plaintiff detainees' immigrant visa applications at the United States Consulate in Hong Kong." *Id.* at 73a.

The government appealed the district court's injunction in *Lisa Le* and suggested that the case be heard initially by the court of appeals en banc. On March 12, 1996, the full court granted initial hearing en banc in *Lisa Le*. App., *infra*, 74a-75a.[10] The government then filed a motion in the instant case, requesting that the panel vacate its judgment (or, in the alternative, further stay the issuance of its mandate) pending the decision of the en banc court in *Lisa Le*.[11] On March 14, 1996, the panel denied that motion. *Id.* at 54a-55a. We accordingly have found it necessary to file this certiorari petition, even though the questions presented are now also before the en banc court of appeals.

REASONS FOR GRANTING THE PETITION

The court of appeals seriously erred in its interpretation of Section 202(a)(1) of the Immigration and Nationality Act (INA). Its decision will undermine the effectiveness of the Comprehensive Plan of Action (CPA), a major foreign policy initiative that has been responsible for bringing an end to the dangerous,

[10] As of March 20, 1996, the en banc court of appeals has not acted on the government's motion for a stay of the district court's injunction in *Lisa Le* pending appeal.

[11] The panel had previously granted the government's motion to stay the issuance of the mandate in this case, to and including March 21, 1996, to permit the government to file a petition for a writ of certiorari. App., *infra*, 52a-53a.

uncontrolled, and clandestine migration of Vietnamese nationals in Southeast Asia. If allowed to stand, the decision will constrain the United States Government's ability to respond to similar migration crises in the future. The decision also casts doubt on other important State Department policies, some rooted in national security concerns, designating specific locations for nationals of certain countries to apply for immigrant visas, or subjecing their applications to special procedures. Moreover, the court of appeals' holding that persons in the United States have a right to obtain judicial review of consular decisions concerning aliens abroad circumvents the well established doctrine of consular nonreviewability and opens an unprecedented avenue of judicial review. Because venue lies in the United States District Court for the District of Columbia over such actions brought by persons residing anywhere in the Nation, the District of Columbia Circuit's rulings on reviewability and the merits have nationwide significance.

The panel's errors, and the significant adverse consequences of those errors, warrant review by this Court. The issues in this case, however, are now being considered by the en banc court of appeals in *Lisa Le*, the companion case. Nevertheless, the panel declined to vacate its judgment in this case or to stay the issuance of its mandate beyond March 21, 1996. Accordingly, we have filed this certiorari petition to protect our right to review of the panel's decision, should the decision of the en banc court be adverse to the government, and also to prevent issuance of the mandate, which would return this case to the district court for class certification proceedings, as directed by the panel. See App., *infra*, 47a. We suggest that the Court hold this petition pending the decision of

the court of appeals in *Lisa Le*, and then dispose of it as appropriate in light of the decision in that case.

1. a. The court of appeals' construction of Section 202(a)(1) of the INA is erroneous. Section 202(a)(1) provides that (with certain exceptions not relevant here) no person shall be discriminated against "in the issuance of an immigrant visa" on the basis of nationality. See 8 U.S.C. 1152(a)(1). It generally prohibits consular officers from granting or denying visas on the basis of nationality. It does not, however, speak to the State Department's authority to control *where* aliens may apply for visas. That subject (known as consular venue) is covered separately by Section 222(a) of the INA, which provides that an alien applying for an immigrant visa "shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." 8 U.S.C. 1202(a).

The reading of Section 202(a)(1) as limited to substantive visa decisions is confirmed by the structure and origin of that provision. Section 202 generally addresses numerical limits on the issuance of immigration visas. The placement of Subsection (a)(1) within that Section therefore indicates that it is directed at the issuance of visas, not that it applies broadly to all consular and State Department functions under the INA. Indeed, the anti-discrimination language was added to Section 202 in 1965 as part of Congress's abandonment of the old immigration system, which employed national-origin quotas. See Pub. L. No. 89-236, § 2, 79 Stat. 911-912. Congress replaced the former system with one that provides (subject to certain exceptions) for "issuance of immigrant visas without regard to national origin." See H.R. Rep. No. 745, 89th Cong., 1st Sess. 19 (1965); *id.* at 9, 10-13, 17; see also S. Rep. No. 748, 89th Cong.,

1st Sess. 12-13, 21-22 (1965). Section 202(a)(1) was intended to address the subject of relative "preference" or "priority," and the corresponding disadvantage of "discrimination," in the allocation of immigration visas. Nothing in its background suggests that it was intended to address consular venue.

The INA therefore does not prohibit the State Department from making distinctions based on nationality in prescribing the form, manner, or place of immigrant visa processing. To the contrary, in enacting Section 222, Congress "consciously decided to leave the determination of place of immigrant visa application to the Secretary of State." 59 Fed. Reg. 39,953 (1994). In fact, when Section 202(a)(1) was enacted, the State Department had long had in place special security procedures governing the processing of visa applications filed by aliens from certain countries, and that practice continues. See Declaration of Cornelius D. Scully, III ¶¶ 3-10 (Aug. 7, 1995) (*Lisa Le* C.A. App. 416-424).

The Department also has numerous consular venue rules turning on nationality, which reflect security, diplomatic, and management concerns, including the location of consular officers who have expertise about conditions in particular countries.[12] Affidavit of Michael Hancock ¶¶ 7-9 (June 15, 1995) (*Lisa Le* C.A. App. 249). For example, because the State Department does not process immigrant visas in their countries, it has directed Afghanis to apply for immigrant visas in Islamabad; Iranians in Abu Dhabi,

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[12] The State Department's reliance on consular officials with expertise is particularly important because, under the INA, the Secretary of State has no authority to overturn a consular official's decision to grant or deny a visa. See 8 U.S.C. 1104(a).

Ankara, Vienna, or Naples; Iraqis in Amman or Casablanca; Lebanese in Abu Dhabi, Damascus, or Nicosia; Libyans in Tunis or Valletta; and Somalis in Nairobi, Dar-es-Salaam, and Djibouti. See Richard D. Steel, *Steel on Immigration Law* § 7.05 n.5 (2d ed. 1992); Scully Dec. Attach. (*Lisa Le* C.A. App. 435). All of those policies are now potentially subject to judicial second-guessing as a result of the court of appeals' mistaken construction of Section 202(a)(1).

b. Even assuming that Section 202(a)(1) governs consular venue, the policy challenged in this case nonetheless does not violate its anti-discrimination rule. As Judge Randolph observed (App., *infra*, 14a-15a), the policy makes a distinction between migrants who have been denied refugee status under the internationally sanctioned CPA review process, and all other aliens, including migrants who have been granted refugee status. The policy thus turns on whether the migrant has been "screened out" under the CPA, not the migrant's nationality. Vietnamese migrants who are "screened in," as well as Vietnamese nationals in Hong Kong not subject to screening under the CPA (whether in Hong Kong legally or illegally) may have their immigrant visa applications processed in Hong Kong. Sykes Aff. ¶ 13 (June 15, 1995) (*Lisa Le* C.A. App. 219).

The CPA was devised to deal with a unique and unprecedented problem of mass migration by Vietnamese and Laotian nationals. It is mistaken to conclude from that fact, however, that the policy at issue here discriminates on the basis of nationality. There are no other nationality groups that are similarly situated yet treated differently. Laotian asylum seekers, who are concentrated in Thailand, are also subject to the CPA refugee screening pro-

cess, and if they are "screened out," they must return to Laos for visa processing. Sykes Aff. ¶ 4 (June 15, 1995) (*Lisa Le* C.A. App. 217).

Furthermore, the panel's decision is legally unsound because there is no basis for concluding that State Department policies regarding the place for acceptance of visa applications have any discriminatory effect on the *issuance* of the visas, which is the subject covered by the statutory anti-discrimination provision. In fact, the consular venue policy challenged by respondents does not have an unfavorable impact on the issuance of visas to Vietnamese nationals. Vietnamese have been among the greatest recipients of immigrant visas in recent years. Hancock Aff. ¶ 5 (June 15, 1995) (*Lisa Le* C.A. App. 248). More than 410,000 Vietnamese nationals, including more than 200,000 immigrants, have been resettled in the United States through the ODP. Sykes Aff. ¶ 14 (June 15, 1995) (*Lisa Le* C.A. App. 219-220); *LAVAS* C.A. App. 192.

c. The court of appeals also erred, as a threshold matter, by disregarding the doctrine of consular nonreviewability. The courts, including this Court, have held that visa decisions are immune from judicial review (except perhaps to the extent that a United States citizen claims that the denial of a visa has violated his or her own constitutional rights). *City of New York* v. *Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989); *Centeno* v. *Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *Ventura-Escamilla* v. *INS*, 647 F.2d 28, 30 (9th Cir. 1981); *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956); *Lem Moon*

Sing v. *United States*, 158 U.S. 538, 547 (1895). But see *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049-1052 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987). The preclusion of judicial review in this context is a consequence of the "power of Congress to exclude aliens altogether from the United States * * * without judicial intervention." *Ventura-Escamilla*, 647 F.2d at 30. It is also based on the historical nature of a visa decision as a diplomatic action, such that disputes regarding visa applications are matters for "diplomatic complaint" between nations, not judicial redress. *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928).[13]

The court of appeals grounded review on the general judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See App., *infra*, 5a. That approach was in error, for Congress has intended the review provisions of the INA to supplant the APA in immigration matters. *Haitian Refugee Center* v. *Baker*, 953 F.2d 1498, 1505-1509 (11th Cir.), cert. denied, 502 U.S. 1122 (1992); see also *Ardestani* v. *INS*, 502 U.S. 129, 133 (1991). Contra *Abourezk*, 785 F.2d at 1050. The INA sets forth the exclusive avenues of judicial review when an alien brings a challenge concerning his exclusion or

[13] An immigrant visa does not provide an alien with any right to admission or entry into the United States. See 8 U.S.C. 1201(h). Rather, it authorizes an alien to travel to a port of entry of the United States. *Ibid.*; see *Hermina Sague* v. *United States*, 416 F. Supp. 217, 218-219 (D.P.R. 1976). A visa tells the officials of other countries, and U.S. immigration officials at a port of entry, that the alien has the United States Government's permission to travel to the United States in order to seek admission.

deportation. Those avenues do not include any provision for judicial review of consular visa determinations, including consular venue decisions.

Although Congress in 1961 expressly authorized judicial review under the INA of determinations affecting aliens who are subject to deportation or exclusion proceedings (see 8 U.S.C. 1105a),[14] that right of review is limited to aliens who are at a port of entry (see 8 U.S.C. 1221(a) and 1225) or who are already "in the United States" (see 8 U.S.C. 1253(a)).[15] Congress provided no corresponding right to judicial review for aliens abroad who seek admission from outside the United States. See *Haitian Refugee* Center, 953 F.2d at 1506; *Loza-Bedoya* v. *INS*, 410 F.2d 343, 347 (9th Cir. 1969); see also *Braude* v. *Wirtz*, 350 F.2d 792, 706 (9th Cir. 1965) ("it [is] not without significance that Congress has limited judicial review to * * * the alien[s] within the borders of this country"). Accordingly, the courts have no authority to review the determination by consular officers not to accept the migrant

[14] 8 U.S.C. 1105a was added to the INA in 1961 by Pub. L. No. 87-301, § 5(a), 75 Stat. 651.

[15] Indeed, Congress enacted 8 U.S.C. 1105a in 1961 to confine judicial review of exclusion orders to habeas corpus proceedings, and thereby to overturn *Brownell* v. *Tom We Shung*, *supra*, which held that such orders were also subject to review in a declaratory judgment action under the APA. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 30-33 (1961). Given that Congress has now precluded review under the APA for aliens physically present in the United States, it follows *a fortiori* that such review is not available to aliens who have not reached our borders. See *Tom We Shung*, 352 U.S. at 184 n.3 (making clear even prior to 1961 enactment of 8 U.S.C. 1105a that APA review was not available to an alien "who has never presented himself at the borders of this country."

respondents' visa applications for processing in Hong Kong.

Indeed, when Congress enacted the INA in 1952 and at that time left judicial review of immigration determinations governed by the APA, its action was specifically "not in

tended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." *Brownell* v. *Tom We Shung*, 352 U.S. at 185 n.6 (quoting S. Rep. No. 1137, 82d Cong., 2d Sess. 28 (1952)). The court of appeals effectively circumvented that rule by recognizing a right of judicial review at the behest of persons in the United States who wish to have an alien abroad admitted to this country. App., *infra*, 5a-6a. But there is no reason to believe that Congress would have wanted to give United States sponsors of aliens the right to judicial review of consular officers' visa decisions, given that it precluded review at the behest of the aliens seeking admission, the persons most directly affected by the consular action.

Finally, even if aliens could obtain judicial review under the APA of some substantive visa decisions, judicial review of the State Department's consular venue decisions is nonetheless precluded because those decisions are "committed to agency discretion by law." 5 U.S.C. 701(a)(1). Section 222(a) provides that aliens seeking visas "shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." 8 U.S.C. 1202(a). That language demonstrates that Congress decided to leave to the Secretary of State the authority to determine where and how aliens shall apply for immigrant visas.

2. a. The court of appeals' decision, if permitted to stand, may have serious adverse consequences for the successful operation and conclusion of the CPA. A principal objective of the CPA has been to deter the dangerous migration of Vietnamese "boat people" throughout Southeast Asia. In the CPA, Hong Kong and other nearby countries, whose resources were severely taxed by the arrival of those migrants, agreed to allow the boat people to land and to permit processing by international organizations of the migrants' claims to refugee status. In return, the international community agreed that migrants found not to be genuine refugees should return to Vietnam and should pursue emigration from Vietnam through regular departure programs. The signatories to the CPA expressed a strong preference for voluntary repatriation of the migrants. See CPA §§ II.B and II.C (Gov't C.A. Br. Addendum). Without the express commitment of the United States and other nations to the repatriation of Vietnamese migrants found not to be genuine refugees, Asian governments likely would not have agreed to grant temporary refuge to the boat people, or would not have allowed the screening of boat people for refugee status within their territories.

The decision below threatens to derail the operation of this program just as it approaches a successful conclusion. The signatories to the CPA hope to resettle or repatriate all Vietnamese migrants by June 1996 (when the CPA is scheduled to terminate formally), or by the end of 1996 at the latest. If the United States Consulate General in Hong Kong is required to accept visa applications from screened-out Vietnamese nationals there, those Vietnamese are unlikely to cooperate with the voluntary repatriation

program established in the CPA. Indeed, since (as the court of appeals stated, see note 7, *supra*) Vietnamese nationals denied visas by the United States Consulate General in Hong Kong can reapply, even those migrants who are denied visas will have no incentive to return to Vietnam rather than remain in Hong Kong, if the Consulate General is required to accept their renewed applications.

The prospect that voluntary repatriation will be disrupted has provoked considerable concern on the part of other signatories to the CPA, including Hong Kong, which reverts to Chinese administration on July 1, 1997. As noted above (pp. 7-8, *supra*), the British Foreign Minister appealed to the Secretary of State to reaffirm the United States Government's commitment to the CPA, the ASEAN nations expressed particular concern that the voluntary repatriation of Vietnamese nationals not be impeded, and the CPA steering committee reaffirmed its commitment to voluntary repatriation. The United States Government joined in the CPA steering committee's consensus in favor of unimpeded operation of the CPA. The United States' express policy not to accept visa applications from screened-out migrants outside Vietnam was established and publicized to send an unequivocal message to those migrants that they must return to Vietnam if they wish to apply for ultimate resettlement in the United States.

b. The decision below has consequences well beyond the operation of the CPA. First, it throws into doubt the ability of the United States Government to enter into similar arrangements with other countries in the event of future migration crises. It thus deprives the United States of a useful and flexible foreign policy tool, and it needlessly interferes with

the ability of the international community to respond to uncontrolled mass migration.

Second, the decision below also casts doubt on the authority of the State Department to establish policies that require special procedures for visa applications by nationals of certain countries, or require nationals of countries where the Department does not have consular officers to apply for visas at certain consular posts. Those policies in many cases are based on operational and management needs that change over time; in some cases, they reflect national security concerns. For example, terrorism may be a problem identified with a particular country, such that visa applications from nationals of that country require special processing. As a result of the court of appeals' decision, the Department's visa processing policies will be subject to judicial scrutiny to determine whether they discriminate on the basis of nationality. That result is an unwarranted (as well as unwise) intrusion into the State Department's conduct of the visa function.

Third, the panel's ruling on reviewability opens a broad new avenue of judicial review of consular decisions at the behest of persons in the United States who claim to be affected by such decisions. Under the logic of that ruling, not just immediate relatives of aliens seeking admission, but also United States employers sponsoring admission of aliens, will now be able to sue to seek overturn an adverse visa decision; indeed, in the *Lisa Le* case, the plaintiffs include a sponsoring employer. See App., *infra*, 72a-73a (plaintiff Vietnamese Catholic Ministry). The reviewability ruling therefore has ramifications for innumerable visa decisions well beyond those in this case, and accordingly warrants review by this Court.

3. Although no other court of appeals has yet addressed whether consular venue rules are subject to the anti-discrimination rule of Section 202(a)(1), we submit that, in the circumstances presented here, the absence of a circuit conflict on that issue does not counsel against review by this Court. The District of Columbia Circuit is, in effect, a court with nationwide venue in controversies involving the Department of State. Any disappointed visa applicant can challenge the Department's consular venue rules by having the sponsoring relative or employer file an action in the United States District Court for the District of Columbia and there gain advantage of the decision below, which will be binding precedent in that court. Indeed, that has already occurred; after the panel issued its decision in this case in February 1995, 26 more Vietnamese nationals in Hong Kong, joined by their sponsors in the United States, filed the companion *Lisa Le* suit in that district court, which issued injunctions against the enforcement of the policy at issue here. See p. 13, *supra*.

The court of appeals recognized the fundamental importance of the issues presented by this petition when it granted initial en banc review in *Lisa Le*. The decision of the en banc court may eventually make it unnecessary for this Court to grant plenary review of the questions presented in this petition. If the en banc court of appeals holds that judicial review is unavailable or upholds the consular venue policy on the merits, it might then choose to vacate the panel decision in this case. Thus far, however, the panel that issued the decision below has declined to vacate its decision pending the outcome of the en banc hearing in *Lisa Le*, and has also declined to stay the issuance of its mandate beyond March 21, 1996. If the

mandate issued, this case would return to the district court for class certification proceedings, pursuant to the terms of the remand ordered by the panel. See App., *infra*, 47a.

We have therefore filed this petition to preserve our ability to gain review of the decision below, and to continue the stay of the mandate under Federal Rule of Appellate Procedure 40(b), thereby preventing the case from returning to the district court for inappropriate class certification proceedings. If the decision of the en banc court in *Lisa Le* should be adverse to the government, we would expect to seek plenary review of that decision (along with the panel's decision in the instant case) in this Court. On the other hand, if the en banc court rules in the government's favor in *Lisa Le*, the Court could then grant the certiorari petition in this case, vacate the judgment of the court of appeals, and remand the case to that court for further consideration in light of its intervening decision in *Lisa Le*. For now, given that the en banc court of appeals is currently considering the same issues, we suggest that the Court hold this petition until the court of appeals renders its decision, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the en banc court of appeals in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MARCH 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

[Filed: Feb. 3, 1995]

Before: EDWARDS, Chief Judge, and SENTELLE and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Circuit Judge RANDOLPH.

SENTELLE, Circuit Judge:

This is an appeal from a grant of summary judgment by a not-for-profit corporation, Legal Assistance for Vietnamese Asylum Seekers, Inc.

("LAVAS"); two detained Vietnamese immigrants in Hong Kong; and their American citizen sponsors, against the United States Department of State and various government officials in their official capacities (collectively "the State Department" or "Department"). Appellants allege the State Department violated its own regulations as well as the Immigration and Nationality Act when refusing to process the visa applications of Vietnamese immigrants, who had not been screened in as political refugees, at the United States Consulate in Hong Kong. Because we find the district court erred in granting summary judgment in favor of appellees, we reverse and remand.

I. BACKGROUND

Since April 1975, when the North Vietnamese captured Saigon, large numbers of refugees have fled Vietnam to Hong Kong. Between June 1979 and June 1988, the treatment of these persons was guided by an informal agreement under which Hong Kong and other nations in the region committed themselves to granting temporary refuge in exchange for a commitment from the United States and other western countries to resettle these immigrants. As part of this agreement, the Hong Kong Government accorded these immigrants presumptive refugee status.

However, due to an increase in the number of persons fleeing Vietnam in the late 1980s, the Hong Kong Government announced it was revoking the presumptive refugee status of the Vietnamese immigrants as of June 15, 1988. Thereafter, all new arrivals would be detained and screened by local immigration authorities to determine whether they individually qualified for refugee status. In June

1989, this approach was adopted throughout the region in the form of a Comprehensive Plan of Action ("CPA"), a joint statement of policy also adopted by the United States. The CPA provides that asylum seekers who are screened out, that is those who do not qualify as refugees under the criteria established in the Refugee Convention, should return to Vietnam. Once returned, those eligible for immigrant visas may apply through the Orderly Departure Program, established to provide for the departure of Vietnamese directly from Vietnam to their resettlement destinations.

The United States permits Vietnamese immigrants, who have as sponsors close relatives who are United States citizens or permanent resident aliens in the United States, to enter as beneficiaries of immigrant visas under the criteria set forth in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1151-1156 (1988). To obtain a visa, eligible Vietnamese immigrants and their sponsors must complete several steps. First, the sponsor must file a petition with the Immigration and Naturalization Service ("INS"). 8 C.F.R. § 204.1(a) (1994). If the INS approves the petition, the Vietnamese applicant must complete and submit to the United States State Department an application for an immigrant visa. 22 C.F.R. § 42.63(a) (1994). Third, the applicant must provide various documents to a United States consulate, and appear at the consulate for final processing of the visa application. 22 C.F.R. § 42.62(a) (1994).

From June 1979 to April 1993, the State Department processed applications for Vietnamese boat people in Hong Kong at the United States consulate. Although the Department directed its posts in

November 1991 to advise screened out applicants to return to Vietnam, the United States consulate in Hong Kong ignored this change in policy. The consulate continued to process the visa applications from screened out Vietnamese. To facilitate this processing, the Consulate General issued letters to the Hong Kong Government requesting that Vietnamese be made available for interviews at the consulate.

In April 1993, however, after an exchange of cables in which the United States consulate in Hong Kong argued it should be permitted to continue processing those immigrants who had been screened out, the Department specifically instructed the consulate to cease such activity. Applicants who had been screened out were thus required to return to Vietnam for visa processing. The United States consulate officially informed the Hong Kong Government of the policy change on September 24, 1993.

On February 25, 1994, appellants brought this action against the State Department and various officials. Appellants sought declaratory and injunctive relief on behalf of a class of Vietnamese nationals desiring to be processed at the United States consulate in Hong Kong, yet who were instructed they would have to return to Vietnam for processing. Appellants also sought such relief on behalf of a class of sponsoring United States citizens and permanent residents who were related to the detained plaintiffs.

Appellants alleged that the State Department's change in policy was in violation of the INA and the regulations promulgated thereunder, the Administrative Procedure Act ("APA"), and the United States Constitution. Following a hearing consolidating appellants' application for a preliminary injunction with the trial of the action on its merits, the district court

issued a final order on April 28, 1994, granting the State Department's motion for summary judgment and denying appellants' cross motion for summary judgment.

II. DISCUSSION

As a threshold issue, appellees contend all of the appellants lack standing to bring this action. The APA grants standing to any party who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1988). *See National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1042 (D.C.Cir.1989). The party must suffer injury in fact, and the interest sought to be protected must arguably be within the zone of interests protected by the statute in question. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395-96, 107 S.Ct. 750, 754-55, 93 L.Ed.2d 757 (1987). We first address the issue of whether the sponsoring resident appellants possess standing. Appellants argue these plaintiffs suffer the requisite injury in fact and are within the zone of interest protected by the INA.

We agree. First, as to injury in fact, the State Department's conduct prolongs the separation of immediate family members. The detained appellants must either remain in Hong Kong, where they are denied the opportunity to be processed, or, if they are required first to return to Vietnam, their processing will be further delayed. We have previously found injury in fact where the plaintiffs were far less aggrieved than in the case at bar. *See, e.g., Abourezk v. Reagan*, 785 F.2d 1043, 1050-51 (D.C.Cir.1986) (holding American plaintiffs possess standing where the State Department denied visas to aliens wishing

to visit the United States to attend meetings at the behest of these plaintiffs).

Second, the resident appellants are within the zone of interest protected by the INA. As the Supreme Court held in *Clarke*, the zone of interest test does not necessarily require a specific congressional purpose to benefit the would-be plaintiff. It is sufficient if the plaintiffs "'establish that their *particular* interest[ ]'" falls within the area of interests Congress intended to protect. *National Fed'n of Fed. Employees*, 883 F.2d at 1047 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 812 (D.C.Cir.1987)). The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. 8 U.S.C. §§ 1151-1156. In originally enacting the INA, Congress "implement[ed] the underlying intention of our immigration laws regarding the preservation of the family unit." H.R.Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect.

Appellees also contend that neither LAVAS nor the detained appellants in Hong Kong have standing. We need not reach this issue. If one party to an action has standing, a court need not decide the standing issue as to other parties when it makes no difference to the merits of the case. *See Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C.Cir.1993) (per curiam).[1]

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[1] We do not address the additional threshold question of mootness raised by the dissent because we do not view it as being properly in the case. No party has suggested that the

We now turn to the merits of the appeal. Appellants allege the State Department's refusal to process the visas of the detained appellants in Hong Kong violates 22 C.F.R. § 42.61(a) of the Department's visa regulations. The regulation concerns the circumstances under which an immigrant seeking a visa can have his case processed in a given consular district. The parties dispute the proper interpretation of this regulation, but we need not construe the version of the regulation in effect at the time the dispute arose because it has been rendered moot by 1994 amendments to 22 C.F.R. § 42.61(a). Visa applicants have no vested right in the issuance of a visa. *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir.1981). They are certainly not entitled to prospective relief based on a no longer effective version of a later amended regulation. It is the amended version which will now govern

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case is moot on the basis asserted by the dissent nor do we understand the dissent to be asserting that the case is moot. The dissent from a reading of the facts determines that the case might possibly be moot and therefore, in the view of the dissent, should have been remanded. Unlike the dissent we find no authority for the proposition that we should remand a case upon our discovery of grounds that might possibly render the case moot. *Johnson v. New York State Education Department*, 409 U.S. 75, 76, 93 S.Ct. 259, 259, 34 L.Ed.2d 290 (1972) (per curiam), did not involve a suggestion that the case *might* be moot. The suggestion in *Johnson* was that the facts were such that the case had in fact become moot. The Supreme Court unremarkably remanded for a determination as to whether the facts were as represented. The suggestion by the dissent in the present case is that the facts *may* have changed so as to make the case moot after the hearing below. Such a speculative possibility not raised by any party to the case could be asserted in a wide array of cases but has never been the basis of a remand to our knowledge.

the admission of the detained Vietnamese, and it is that version we must construe:

> (a) *Alien to apply in consular district of residence.* Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. . . .

59 Fed.Reg. 39,955 (1994) (to be codified at 22 C.F.R. § 42.61).

Under this regulation, an alien desiring a visa shall apply at the consular office where he resides. Alternatively, an alien physically present in an area has the option of applying at the consular office having jurisdiction over that area if he satisfies a precondition.[2] However, asserting its authority under the regulation to "direct otherwise," the Department has ceased processing Vietnamese immigrants in Hong Kong at the consular office. Nationals of other countries not subject to the CPA are still processed at the consular office.

Although appellees' regulation permits this differing treatment, appellants claim the discrimination violates 8 U.S.C. § 1152(a) of the INA. This section provides "no person shall . . . be discriminated

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[2] We need not distinguish the terms "reside" and "physically present" for purposes of this appeal.

against in the issuance of an immigrant visa because of the person's . . . nationality . . . or place of residence." Appellants argue that the Department violated the statute in drawing an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants. Appellants assert this statute compels this court to invalidate any attempt to draw a distinction based on nationality in the issuance of visas. In contrast, appellees urge us to adopt the position that so long as they possess a rational basis for making the distinction, they are not in violation of the statute. Appellees maintain the goal of encouraging voluntary repatriation and the aims of the CPA certainly provide a rational basis for the practices and policies in question.

We agree with appellants' interpretation of the statute. Congress could hardly have chosen more explicit language. While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most compelling—perhaps a national emergency. We cannot rewrite a statutory provision which by its own terms provides no exceptions or qualifications simply on a preferred "rational basis." *Cf. Haitian Refugee Ctr. v. Civiletti*, 503 F.Supp. 442, 453 (S.D.Fla.1980) (under 8 U.S.C. § 1152(a), INS has no authority to discriminate on the basis of national origin, except perhaps by promulgating regulations in a time of national emergency).

Appellees rely on *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir.1979), for the proposition that their nationality-based discrimination passes muster under section 1152(a) as long as they possess a rational justifi-

cation. In *Narenji*, we upheld an INS regulation requiring nonimmigrant alien students in the United States who were natives or citizens of Iran to report to an INS office to provide information concerning their nonimmigrant status. *Id.* at 746-47. The INA delegated to the Attorney General the authority to prescribe conditions of admission to the United States for nonimmigrant aliens. 8 U.S.C. § 1184(a). The INA also authorized the Attorney General to order the deportation of any nonimmigrant alien who failed to comply with the conditions of his status. 8 U.S.C. § 1251(a)(9). We held that a broad mandate of the INA delegating to the Attorney General the authority to prescribe conditions of admission to the United States on the part of nonimmigrant aliens authorized the Attorney General to draw distinctions among nonimmigrant aliens on the basis of nationality. *Narenji*, 617 F.2d at 747. We then examined whether the regulation violated the Constitution. In finding no violation, we stated that we would sustain classifications on the basis of nationality drawn by the Congress or the Executive in the immigration field, so long as they were not wholly irrational. *Id.* Appellants argue that *Narenji* compels us to sustain the distinctions drawn in the present regulations.

Appellees' reliance on *Narenji* is misplaced. In that case the court was considering the power of the Immigration and Naturalization Service to promulgate nationality-based regulations and the constitutionality of such regulations if otherwise properly promulgated. Under constitutional standards we found no equal protection violation. *Id.* at 748. The *Narenji* court did not consider the effect on the agency regulatory authority to make distinctions of a statute flatly forbidding nationality-based discrimination. Here the agency's nationality-based regulation runs athwart such a statute. The appellees' proffered statutory interpretation, leaving it fully possessed of all its constitutional power to make nationality-based distinctions, would render 8 U.S.C. § 1152(a) a virtual nullity.

Section 1152 is a part of the Immigration and Nationality Act. This is an act committed to the administration of the Immigration and Naturalization Service and we review its interpretations deferentially under the standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). Even under that standard the Service's present interpretation fails. Where Congress has unambiguously expressed its intent, we need go no further. Here, Congress has unambiguously directed that no nationality-based discrimination shall occur. There is no room for the Service's interpretation proffered by the Department.

Under the APA, this court is obligated to hold unlawful and set aside agency action found to be not in accordance with law. 5 U.S.C. 706(2)(A) (1988). The interpretation and application of the regulation so as to discriminate against Vietnamese on the basis of their nationality is in violation of the Act, and therefore not in accordance with law.

The dissent's contention that the distinction drawn by the Department is the permissible line between legal and illegal immigrants as opposed to the impermissible nationality-based line between Vietnamese and non-Vietnamese illegal immigrants is simply not supported by the record. The case reaches us on appeal from summary judgment At the summary judgment stage in the district court, the defendants

expressly stated in their "Statement in Response to Plaintiffs' Statement of Material Facts as to which there is no Genuine Dispute," that "in approximately April, 1993, the Department changed its practice or policy relating to the processing of immigrant visa petitions of *Vietnamese nationals* residing illegally in Hong Kong." (Joint Appendix 353) (emphasis added). The Department has never contended here or in the district court that this change was made as to any other nationals than Vietnamese nationals nor that illegally present nationals of other countries would be treated the same as illegally present Vietnamese nationals. We neither hold nor imply that any statute requires that the same treatment be afforded legal and illegal status.

III. CONCLUSION

Accordingly, we reverse the district court's grant of summary judgment in favor of appellees and remand the case for a disposition consistent with this opinion.

It is so ordered.

RANDOLPH, Circuit Judge, dissenting:

My objections to the majority opinion are, first, that the decision on the merits is in error, and second, that the prospect of mootness should have precluded any decision on the merits. I realize that discussing the issues in this sequence inverts the usual order. But the majority's mistake on the merits is the more serious in terms of lasting consequences and I shall therefore begin with it.

The British crown colony of Hong Kong is one of the most densely populated regions in the world. Within its tiny area, nearly six million people reside. Because of Hong Kong's proximity to Vietnam it has become one of the prime destinations for Vietnamese "boat people," more than 750,000 of whom have fled to the countries of Southeast Asia during the past nineteen years. After the fall of Saigon in 1975, the United States pressed "first asylum" countries such as Hong Kong to provide a safe haven for these people until they could be resettled elsewhere or returned to Vietnam. But as the years passed, the influx of boat people continued. Since June 1988, more than 71,000 individuals from Vietnam have arrived on Hong Kong's shores and wound up in its detention camps. In an effort to stem the tide and to relieve itself of the burdens imposed by this mass exodus, Hong Kong entered into a Comprehensive Plan of Action with fifty other nations, including the United States. Developed in 1989, the Plan governs the screening of asylum seekers and provides that those persons not recognized as "refugees" pursuant to international criteria—those who have been "screened out"—must return to Vietnam in order to seek resettlement in a third country.

For the moment, Hong Kong and the other "first asylum" countries are exercising forbearance. They are following a program of voluntary repatriation for those who have been "screened out." Hong Kong is, in other words, asking these people to depart voluntarily rather than forcibly expelling them, as it presumably has every right to do since they are there illegally. The head of the State Department's Bureau of Refugee Programs believes that it is "fundamentally important to the success" of the Comprehensive Plan that "Vietnamese in the camps have the clear perception that there is no alternative for the screened out but to return to Vietnam." "[A]nything that clouds that perception or gives birth to rumors that resettlement of the screened out is possible will reduce voluntary repatriation and create a situation in which resort to mandatory repatriation by first asylum governments is made more likely."

The potential repercussions of the majority's decision are, to say the least, disquieting. The flight of illegal aliens to Hong Kong and elsewhere has created an international crisis. Fifty nations have sought to avert the flood by stopping the flow. Not processing their visas in Hong Kong removes one of the reasons so many of these people are leaving their homeland and embarking on the dangerous journey across the South China Sea. Now the majority holds that it is illegal for the United States consular office in Hong Kong to abide by the Comprehensive Plan and refuse to process immigrant visas for Vietnamese boat people detained in the camps. Why? Because this is discrimination on the basis of nationality and 8 U.S.C. § 1152 provides, with certain exceptions, that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's

race, sex, nationality, place of birth, or place of residence."

But it is not nationality that precludes visa processing. The so-called "discrimination" the majority detects stems from the illegal status of the screened out boat people, rather than from the fact (if it is a fact) that they are all Vietnamese nationals. Compare two Vietnamese nationals in Hong Kong, one there illegally and currently living in a detention camp and the other there legally, perhaps working or on holiday. As implemented, the current regulation allows processing of the legal Vietnamese but not the illegal one. That is not discrimination on the basis of nationality, but discrimination on the basis of legality. And the statute does not forbid it. Still less is the State Department's current regulation a "nationality based regulation," as the majority supposes. The regulation reads:

> (a) *Alien to apply in consular district of residence.* Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. . . .

59 Fed.Reg. 39,955 (1994) (to be codified at 22 C.F.R. § 42.61). There is not a word here relating to an alien's nationality. Within the United States illegal aliens are treated far differently than those who are

legally here. It is beyond belief that distinguishing—that is, discriminating—among visa applicants on the same ground is forbidden. The regulation, through the words "unless otherwise directed," permits the State Department to make this distinction and section 1152 does not forbid it.

To show that the State Department was discriminating against the detainees because they were Vietnamese, the majority quotes a statement of the defendants and italicizes two words: "in approximately April, 1993, the Department changed its practice or policy relating to the processing of immigrant visa petitions of *Vietnamese nationals* residing illegally in Hong Kong." Consider the quotation again, this time without the distracting italics. It indicates that the State Department's policy dealt only with those Vietnamese "residing illegally in Hong Kong." That makes my point, not the majority's. Other Vietnamese in Hong Kong may be processed. What causes the difference in treatment? Not nationality, but the common sense international distinction between aliens who enter a country illegally and those who enter legally.

There may be room for an argument that the State Department will process other illegal immigrants—that is, other than the Hong Kong detainees—in foreign countries despite their illegal status, and therefore the Vietnamese boat people are being singled out because they are Vietnamese. But there is no evidence that this sort of thing is going on; and the regulation is so new that I doubt whether any world-wide customary practice under it can yet be discerned.

Given the profound consequences of judicial intervention and the danger that a decision might dis-

mantle this carefully wrought international program designed to bring a humane and swift end to the continuing problem of illegal immigration, it is critical that we decide only what we have to decide. The majority has followed another course, which brings me to my second objection. Of the five plaintiffs, two are—or were—screened out Vietnamese residing in one of the Hong Kong camps. The oral argument in this case revealed that these alien-plaintiffs may have already been processed. Their preference numbers came up nearly a year ago. *See Kooritzky v. Reich*, 17 F.3d 1509, 1510-11 (D.C.Cir.1994). At the time of the district court's decision—April 1994—the State Department was still processing detainees whose visa applications were current, that is, those whose preference numbers had been reached. It therefore appears quite likely that the alien-plaintiffs are now in the United States. If they are, their two sponsors, who are also plaintiffs, have no further interest in the case. The case was never certified as a class action. The district court made no findings regarding the status of the alien-plaintiffs and neither the plaintiffs' nor the government's counsel at oral argument could say whether a live controversy still exists.

If the alien-plaintiffs have already received relief, the case could not be saved by qualifying as one capable of repetition but evading review. The capable of repetition part of the formulation means the complaining party is likely to be subjected to the same challenged activity in the future. We so held in *Christian Knights of the Ku Klux Klan v. District of Columbia*, 972 F.2d 365, 370 (D.C.Cir.1992), citing several Supreme Court decisions on the point. If the individual Hong Kong plaintiffs already had their

applications processed, they will not suffer the same fate in the future.

Without the aliens or their sponsors in the case, our deciding the merits would be warranted only if the remaining plaintiff, LAVAS, had standing, which it does not. The harm it alleges—a possible future strain on its resources—is general and speculative, *see Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); and the organization is not within the zone of interest the statute was meant to protect, *cf. INS v. Legalization Assistance Project of the Los Angeles County Fed'n of Labor*, ___U.S.___, ___, 114 S.Ct. 422, 424, 126 L.Ed.2d 410 (1993) (Circuit Justice O'Connor).

The proper course therefore should have been to remand the case to the district court to make a finding whether the case is moot. We do not have to be entirely certain the case has become moot; if there is cause to believe it has met that fate, a remand is warranted. That is what the Supreme Court does when it encounters this sort of situation. *See, e.g., White v. Regester*, 422 U.S. 935, 936, 95 S.Ct. 2670, 2671, 45 L.Ed.2d 662 (1975) (per curiam); *Hill v. Printing Indus. of the Gulf Coast*, 422 U.S. 937, 938, 95 S.Ct. 2670, 2670, 45 L.Ed.2d 664 (1975) (per curiam); *Indiana Employment Security Div. v. Burney*, 409 U.S. 540, 541-42, 93 S.Ct. 883, 883-85, 35 L.Ed.2d 62 (1973) (per curiam); *Johnson v. New York State Educ. Dep't*, 409 U.S. 75, 76, 93 S.Ct. 259, 259, 34 L.Ed.2d 290 (1972) (per curiam) ("[G]iven the suggestion at oral argument . . . the case is remanded to the [district court] to determine whether this case has become moot."). And that is what we should have done rather than rushing into the merits.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Mar. 2, 1994]

ORDER

Before the Court is plaintiffs' application for a temporary restraining order, which was filed on February 25, 1994. In that application, plaintiffs asked that pending a hearing on their motion for a preliminary injunction, the Court enjoin defendants from "taking any further action to implement their decision to refuse processing visa applications of all Vietnamese nationals currently detained in Hong Kong who are beneficiaries of current immigrant visa petitions, including but not limited to, any further communication to the beneficiaries regarding such

decision."[1] Defendants have already instructed their consulates in Hong Kong to begin processing the immigrant visa applications of aliens detained there. Moreover, defendants have directed their officers not to advise immigrants that their applications will not be adjudicated in first asylum countries and to use their "best efforts with host country officials to see that U.S. immigrant visa petition beneficiaries are not involuntarily repatriated and that such beneficiaries who may be planning to repatriate voluntarily are informed that review is taking place." Defs.' Opp'n Exs. A-B. Therefore, the Court finds that plaintiffs have been granted at least temporarily the relief requested in their application for a temporary restraining order, and thus that plaintiffs' application is moot.

At the March 1, 1994, hearing on plaintiffs' application for a temporary restraining order, plaintiffs, through the submission of a new proposed order, asked for relief beyond that requested in their original application, and beyond that provided voluntarily by defendants. The Court questions whether this request is properly before the Court in this posture. Nevertheless, assuming the modified request is properly treated as a new application for a temporary restraining order, the Court finds that the factors set forth in *National Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (quoting *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C. Cir. 1989)), have not been satisfied so as now to warrant injunctive relief. Accordingly, it hereby is

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[1] Analytically, such a request does not seek to "restrain" anything; it seeks affirmative injunctive relief.

ORDERED, that plaintiffs' application for a temporary restraining order is denied. It hereby further is

ORDERED, that defendants' opposition to plaintiffs' motion for a preliminary injunction and defendants' dispositive motion shall be filed on March 15, 1994; plaintiffs' reply/opposition shall be filed on March 29, 1994; and defendants' reply shall be filed on April 5, 1994. It hereby further is

ORDERED, that the combined hearing pursuant to Fed. R. Civ. P. 65(a)(2) on plaintiffs' motion for a preliminary injunction and the merits is scheduled for April 7, 1994, at 5:00 p.m., in courtroom 14.

SO ORDERED.

/s/ *Stanley S. Harris*
Stanley S. Harris
United States District Judge

Date: MAR 2 1994

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5046

SEPTEMBER TERM, 1993 94CV00361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS; WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

[Filed: Mar. 6, 1994]

ORDER

BEFORE: EDWARDS, GINSBURG, and SENTELLE* Circuit Judges

Upon consideration of the motion for expedited consideration, the emergency motion for relief pending appeal, the response thereto, and the reply, it is

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* Judge Sentelle would dismiss the appeal because in his view this court does not have jurisdiction over the denial of a temporary restraining order. *See Office of Personnel Management v. American Federal of Government Employees, AFL-CIO*, 473 U.S. 1301, 1305 (Burger, Circuit Justice 1985).

ORDERED that the request for preliminary injunctive relief be granted. The appellees are hereby enjoined to take all necessary and proper action to ensure that appellants are not repatriated until the district court proceedings have been completed. Appellants have asserted violations of statutory rights conferred by 22 C.F.R. § 42.61(a) ("Under ordinary circumstances an alien seeking an immigration visa shall have the case processed in the consular district in which the alien resides."); the Immigration and Nationality Act, 8 U.S.C. § 1152 ("No person shall . . . be discriminated against in the issuance of an immigration visa because of the person's race, sex, nationality, place of birth, or place of residence."); and the Administrative Procedures Act, 5 U.S.C. § 553 (rulemaking requires notice and comment). They further claim that forced repatriation will irreparably harm their efforts to emigrate. On balance the equities favor the granting of injunctive relief. *See Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972 (D.C. Cir. 1985) (per curiam). It is

FURTHER ORDERED that this case be remanded to the district court for further proceedings. The injunction shall remain in place pending completion of the district court proceedings.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Ron H. Garvin, Clerk

By: /s/ Cheri Carter
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Apr. 28, 1994]

MEMORANDUM ORDER

This case is before the Court on plaintiff's application for a preliminary injunction and on cross-motions for summary judgment.[1] With the agree-

[1] The case presently is in a strange posture. On March 2, 1994, the Court denied plaintiff's application for a temporary restraining order. *Legal Assistance For Vietnamese Asylum Seekers v. United States Dep't of State*, CA No. 94-361 (D.D.C. Mar. 2, 1994). Although the Supreme Court found it necessary to point out to the Court of Appeals that it has no jurisdiction over a trial court's denial of a motion for a temporary restraining order, *see OPM v. American Fed'n of Gov't Employees*, 473 U.S. 1301, 1305 (Burger, Circuit Justice 1985), a

ment of the parties, the Court consolidated the hearing on the application for a preliminary injunction with the hearing on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Upon consideration of the entire record, including the arguments of counsel at the hearing held on April 7, 1994, the Court grants defendants' motion for summary judgment and denies plaintiffs' motion for summary judgment. The Court also denies plaintiffs' motion for a preliminary injunction as moot. Although "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56," Fed. R. Civ. P. 52(a), the Court nonetheless briefly sets forth its analysis.

Plaintiffs challenge defendants' position that it is proper to process in Vietnam the immigrant visa applications of those Vietnamese asylum-seekers denied refugee status by the Hong Kong government. Plaintiffs contend that this policy is contrary to the Immigration and Nationality Act ("INA"), and the regulations promulgated thereunder, the Administrative Procedure Act ("APA"), and the United States Constitution. Defendants presently are processing the applications of current immigration visa petition beneficiaries in Hong Kong, subject to agreement by the Hong Kong government to make the detainees available, and thus voluntarily have granted plaintiffs part of the relief they seek. Plaintiffs also request, however, a permanent injunction directing defendants "to take all necessary and proper action to facilitate and expedite processing

majority of a panel of the Court of Appeals rather extraordinarily granted preliminary injunctive relief to plaintiffs. *See Legal Assistance For Vietnamese Asylum Seekers v. United States Dep't of State*, No. 94-5046 (D.C. Cir. Mar. 6, 1994).

and to otherwise eliminate the effects of [defendants'] illegal policy." Pls.' Mot. for Summ. J. at 3.

Defendants assert that plaintiffs' complaint presents a nonjusticiable political question because an order granting plaintiffs' proposed relief would intrude into the areas of foreign affairs and immigration policy. The Court is inclined to agree. *See Baker v. Carr*, 369 U.S. 186 (1962); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1548-49 (D.C. Cir. 1984) (en banc) (Tamm, J., dissenting), *vacated on other grounds*, 471 U.S. 1113 (1985); *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978).

Because an allegation of nonjusticiability is a jurisdictional question, this determination should end the Court's inquiry. *Id.* at 954 n.7. The Court finds, however, that more recent precedent makes the issue a close one. *See DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236 (D.C. Cir. 1987); *Population Inst. v. McPherson*, 797 F.2d 1062 (D.C. Cir. 1986); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985). Therefore, because the merits of the case are clear, the Court resolves the merits without reaching the jurisdictional issue. *See Adams v. Vance*, 570 F.2d at 954 n.7.[2]

Plaintiffs argue that defendants' failure to process the detained plaintiffs' immigrant visas in Hong Kong violates regulations promulgated pursuant to Section

[2] The Court rejects defendants' argument that plaintiffs lack standing. *See Valley Forge Christian College v. Americans United for Separation of Church and States, Inc.*, 454 U.S. 464 (1982); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

222 of the INA, 8 U.S.C. § 1202(a).[3] The regulations state:

> Under ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides. The consular officer shall accept the case of an alien having no residence in the consular district, however, if the alien is physically present and expects to remain therein for the period required for processing the case. An immigrant visa case may, in the discretion of the consular officer, or shall, at the direction of the Department, be accepted from an alien who is neither a resident of nor physically present in, the consular district.

22 C.F.R. §§ 42.61. Defendants have determined that the situation of the detained Vietnamese asylum-seekers in Hong Kong is not an "ordinary circumstance."[4] This policy choice is entitled to deference. "The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting *Mathews v.*

[3] Plaintiffs also argue that the failure to process constitutes an arbitrary and capricious change in policy, as well as unlawful discrimination on the basis of national origin. In addition, they argue that defendants violated the notice and comment provisions of the APA. The Court finds these arguments meritless.

[4] Plaintiffs assert that the phrase "under ordinary circumstances" affords consular officers discretion in extraordinary circumstances to process the visa applications of non-resident aliens. The Court finds that this reading of the regulation would render the third sentence superfluous, and hence is invalid.

Diaz, 426 U.S. 67, 81-82 (1976)). Thus the Court finds that the failure to process the immigrant visa applications of Vietnamese asylum-seekers denied refugee status in Hong Kong does not violate the INA and the regulations promulgated thereunder. Accordingly, it hereby is,

ORDERED, that defendants' motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied. It hereby further is

ORDERED, that plaintiffs' motion for a preliminary injunction is denied as moot. It hereby further is

ORDERED, that plaintiffs' motion for class certification is denied as moot.

SO ORDERED.

/s/ STANLEY S. HARRIS
STANLEY S. HARRIS
United States District Judge

Date: APR 28 1994

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1994 (94CV00361)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed: May 9, 1995]

ORDER

BEFORE: EDWARDS, *Chief Judge*, and SENTELLE and RANDOLPH, *Circuit Judges*.

Upon consideration of appellees' petition for rehearing, appellants' response thereto, and appellees' motion for leave to file a reply, it is

ORDERED that appellees' motion for leave to file a reply be granted. The parties disagree as to whether this case is moot, and because resolution of the dispute may require the evaluation of evidence presented by the parties, it is

FURTHER ORDERED that the record of this case be remanded to the District Court for a determination of mootness. It is

FURTHER ORDERED that the petition for rehearing be held in abeyance until the District Court has determined the issue of mootness.

Per curiam
For the Court:

/s/ Robert A. Bonner

By: Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 94-361 SSH

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS ("LAVAS"), ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Sept. 11, 1995]

MEMORANDUM OPINION

The facts of this case are set out in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Legal Assistance for Vietnamese Asylum Seekers ("LAVAS") v. United States Department of State, Bureau of Consular Affairs*, 45 F.3d 469 (D.C. Cir. 1995). In brief, the procedural posture of this case is as follows: on February 25, 1994, plaintiffs filed a com-plaint, a motion for class certification, and a motion for a temporary restraining order and a preliminary injunction against defendants. On March 2, 1994, this Court

denied plaintiffs' motion for a temporary restraining order, and the Court thereafter consoli-dated plaintiffs' motion for a preliminary injunction with a determination on the merits.[1] On April 28, 1994, the Court granted defendants' motion for summary judgment, finding that defendants' policy of not processing at the United States Consulate in Hong Kong the immigrant visa applications of Vietnamese asylum-seekers who had been determined by the Hong Kong government not to qualify for refugee status did not violate the Constitution, the APA, or the Immigration and Nationality Act ("INA") or any regulations promulgated thereunder. The Court denied plaintiffs' motion for class certification as moot in the same Memorandum Order granting defendants' motion for summary judgment.

On February 3, 1995, the Court of Appeals reversed this Court's decision. *LAVAS*, 45 F.3d 469. A majority of the panel found that the Department of State's (hereinafter "DoS") policy of refusing to process the immigrant visa applications of "screened-out" Vietnamese asylum-seekers violated the INA because the policy constituted discrimination on the basis of nationality. *Id.* at 471-73. Judge Randolph dissented, contending that the DoS's policy did not

[1] Curiously, the Court of Appeals exercised jurisdiction over plaintiffs' appeal from this Court's denial of their motion for a temporary restraining order and ordered that defendants "take all necessary and proper action to ensure that [plaintiffs] are not repatriated until district court proceedings have been completed." *See Office of Personnel Management v. American Federation of Government Employees, AFL-CIO*, 473 U.S. 1301, 1305 (Burger, Circuit Justice, 1985) (declaring specifically that a court of appeals has no jurisdiction to review the denial by a district court of a motion for temporary restraining order).

discriminate on the basis of nationality, but rather on the basis of refugee status, which distinction constituted an acceptable and legal determination. *Id.* at 475. In addition, Judge Randolph noted in his dissent that the case had probably become moot, and that at the very least, the case should be remanded to this Court for a mootness determination. *Id.* at 476.

Defendants filed a petition for rehearing *en banc*. On May 9, 1995, the Court of Appeals remanded the case to this Court for a determination of mootness, holding defendants' petition for rehearing *en banc* in abeyance until such a determination has been made. This Court requested briefing from the parties on the mootness issue. Plaintiffs responded by filing a motion for summary judgment on the mootness issue, a renewed motion for class certification, and a motion to join additional parties. Defendants filed a motion to dismiss the case on mootness grounds. Upon consideration, the Court finds, first, that the two named plaintiffs' cases have become moot; second, that plaintiff LAVAS lacks standing; and third, that the case must be declared moot.

The Individual Plaintiffs' Cases Have Become Moot

Four persons and one organization are named plaintiffs in this action.[2] Plaintiffs concede that two of the five plaintiffs' cases have become moot. The immigrant visa application of plaintiff Thu Hoa Thi Le Dang was processed by the United States Consulate in Hong Kong and was granted on July 21, 1994,

[2] Actually, the four individual plaintiffs are made up of two pairs, each consisting of one Vietnamese refugee and that refugee's sponsor in the United States.

rendering her claims and the claims of her stateside sponsor, Thua Van Le, moot.

The application of detained plaintiff Truc Hua Thi Vo was likewise processed at the United States Consulate in Hong Kong and was denied on November 30, 1994. Ms. Vo has one year from the date of denial of her immigrant visa application to supply the Consulate with additional documentation to support her application, or her application will be canceled.

Plaintiffs contend that the current status of Ms. Vo's application is such that her case cannot be moot, since the Consulate has not yet made a "final" determination to grant or deny her immigrant visa application, but has made only an "initial" determination to deny her application. Defendants argue that Ms. Vo has obtained the relief she sought—namely, that her immigrant visa application be processed by the United States Consulate in Hong Kong, rather than after a forced repatriation to Vietnam. The Court agrees with defendants. Ms. Vo has obtained the specific relief she sought and has had her application processed by the United States Consulate in Hong Kong. Plaintiffs are correct that the Consulate has not yet finally determined whether Ms. Vo's immigrant visa application will be granted or denied, but the relief Ms. Vo sought from this Court—the processing of her application in Hong Kong instead of Vietnam—has been achieved. (The Court has, of course, no power to review a final determination of the Consulate as to the merits of Ms. Vo's immigrant visa application.) Ms. Vo's claims, and those of her citizen-sponsor, Em Van Vo, are therefore moot.

Plaintiffs argue that the opinion of the D.C. Circuit in *City of New York v. Baker*, 878 F.2d 507 (D.C. Cir.

1989), requires the Court to reach the opposite conclusion. Plaintiffs are in error. *Baker* involved a challenge to the Secretary of State's refusal to issue non-immigrant visas to certain aliens to whom plaintiffs had extended invitations to speak in the United States. Following an initial remand by the Court of Appeals to the district court for resolution of two statutory issues, Congress independently passed an amendment to the relevant statute that appeared to prohibit exclusion of the aliens on the bases initially asserted by the Secretary of State. The Court of Appeals in *Baker* held that plaintiffs' action was not rendered moot by the amendment or by the government's concession that it would not seek to exclude the alien plaintiffs from entry into the United States, noting that "the voluntary cessation of a challenged practice does not in and of itself moot a case when the party could renew it." 878 F.2d at 511-12.[3]

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[3] The court in *Baker* relied heavily on the opinion of the Second Circuit in *Allende v. Shultz*, 845 F.2d 1111 (2d Cir. 1988), in finding that the case before it was not moot. The court of appeals in *Allende*, presented with circumstances similar to those in *Baker*, held that the case before it was not moot because "the validity of [the allegedly unlawful] policy in general remains a live controversy. And since the existence of the policy continues to effect [sic] the actions of the plaintiffs who may reasonably expect that the government will oppose future plans to extend speaking invitations to [plaintiff] Allende, we find the Article III case or controversy requirement satisfied." 845 F.2d at 1115 n.7. As the court in *Allende* recognized, and as this Court notes *infra*, the pivotal issue here is not the continued presence of an allegedly unlawful regulation; rather, it is the potential that the plaintiffs will, at some point in the future, be again subjected to that allegedly unlawful regulation. No such potential exists here.

The potential that the *Baker* court recognized—namely, the potential that the DoS could "reassert its earlier position, which the government has not renounced," 878 F.2d at 511, and again exclude plaintiffs from entry into the United States—simply does not exist with respect to Ms. Vo. While the DoS has in fact reinstated its policy of not processing in Hong Kong the immigrant visa applications of non-refugee Vietnamese asylum seekers, that policy has no application to Ms. Vo or her stateside sponsor, since Ms. Vo's application already was processed by the Consulate in Hong Kong, and since her appeal from the denial of her application is also being processed in Hong Kong. Plaintiffs in effect are requesting the Court to read Baker as allowing this case to continue forward after the named plaintiffs have had the relief they seek accorded them, simply because the policy they alleged to be discriminatory was reinstated after they had been granted that relief (which means, in overall effect, that defendants "have not renounced" their position on the matter). Once put in this light, the problem with this approach becomes apparent: plaintiffs no longer have standing to contest the DoS's allegedly discriminatory policy. The Court cannot ignore simple principles of standing in favor of keeping a moribund "case or controversy" alive, when the plaintiffs no longer can allege that they are suffering or are remotely likely to suffer any injury from the allegedly discriminatory actions of defendants.

LAVAS Lacks Standing To Sue in this Action

LAVAS is, according to plaintiffs' own description, a nonprofit corporation "whose mission it is to provide legal assistance to indigent Vietnamese asylum-

seekers." *See* Certification under Rule 104(g), filed February 25, 1994. LAVAS lacks standing to raise claims challenging the DoS's policies or regulations promulgated under the INA. *See Immigration and Naturalization Service v. Legalization Assistance Project*, 114 S.Ct. 422, 424 (1993) (O'Connor, J., in chambers) (ruling that legal assistance organization which challenged INS regulations fell outside the zone of interests protected by those regulations, and that the organization therefore lacked standing); *Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1994) (holding that "Qualified Designated Entities" authorized to act as intermediaries between aliens and the INS had no standing to challenge INS policies interpreting aliens' rights to legalization). Therefore, LAVAS is dismissed from this suit.[4]

The Action Is Moot

With the dismissal of LAVAS from this case, and with the determination that the named plaintiffs' claims have become moot, the case as a whole has become moot as well. Plaintiffs contend that their renewed motion for class certification, which initially was denied by the Court as moot in its Memorandum Order granting defendants' motion for summary judgment, should serve to resuscitate this case, despite the fact that the named plaintiffs' cases are now moot. Plaintiffs are not correct. The Court

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[4] The Court of Appeals did not reach the issue of LAVAS's standing in its opinion, because it considered that the named plaintiffs residing in the United States had standing to sue and therefore declined to reach the standing issue with respect to the other named plaintiffs. *LAVAS*, 45 F.3d at 472 (citing *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) (per curiam)).

quite properly denied plaintiffs' motion for class certification as moot when it issued its Order granting defendants' motion for summary judgment. Because no class was certified by the Court, and because the named plaintiffs' claims have now become moot, no case or controversy exists on which to append a class of plaintiffs, or new individual plaintiffs, for that matter. *See Board of School Commissioners v. Jacobs*, 420 U.S. 129, 130, 95 S.Ct. 849, 850 (1975) (where case or controversy no longer exists as to named plaintiffs, case is moot unless it was certified as a class action, a controversy still exists between defendants and members of the class, and the issue in controversy is capable of repetition yet evading review).

This decision does not in any meaningful way constitute a setback for plaintiffs. Currently pending before the Court is a motion for preliminary injunction and cross-motions for summary judgment in *Vo Van Chau v. Department of State, Bureau of Consular Affairs*, Civil Action No. 95-989 SSH. Plaintiffs in *Vo Van Chau* bring the same claims and allegations against the DoS as plaintiffs allege in this case, so plaintiffs are not relegated back to the beginning of the queue by virtue of this decision, since the Court must soon make a determination as to the motions currently pending in *Vo Van Chau*. Accordingly, it hereby is

DECREED, that this case is moot. The Clerk of the Court is directed to transmit a copy of this Memorandum Opinion to the Court of Appeals.

/s/ *Stanley S. Harris*
STANLEY S. HARRIS
United States District Judge

Date: SEP 11 1995

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; THUA VAN LE; EM VAN VO; THU HOA THI DANG; TRUC HOA THI VO, APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

ON PETITION FOR REHEARING

[Filed: Feb. 2, 1996]*

Before: EDWARDS, *Chief Judge*, SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SENTELLE.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* RANDOLPH.

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* Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

SENTELLE, *Circuit Judge*: On this petition for rehearing and suggestion for rehearing *in banc*, the United States Department of State argues that the case has been mooted by its tender of the relief requested by the individual appellants. The District Court has ruled on remand in favor of the State Department on the mootness issue, but the appellants contest this ruling. Because we hold that the case is not moot as to two of the individual named appellants, we reverse the District Court's mootness determination, deny rehearing, and remand the case for treatment consistent with both this opinion and our prior opinion on the merits of the State Department's policies. *See Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs* (hereinafter "*LAVAS*"), 45 F.3d 469 (D.C. Cir. 1995).

I. FACTUAL BACKGROUND

This case arises out of disagreements over the procedures used for handling the tremendous flow of immigrants out of Vietnam that has continued ever since the North Vietnamese took over South Vietnam in 1975. From June 1979 through June 1988, Hong Kong (and other nations in the region) granted presumptive refugee status to Vietnamese immigrants on the condition that the United States and other western countries would help resettle them. But in 1988, following an increase in the number of economic immigrants, Hong Kong changed its policies, determining that it would detain all new arrivals and screen them for actual refugee status. The countries concerned soon formed the Comprehensive Plan of Action, which provides that those screened out as

non-refugees should return to Vietnam, where they can then apply for immigrant visas.

In April 1993, the United States Consulate in Hong Kong stopped processing immigrant visa applications on orders from the United States State Department. In February 1994, plaintiffs Legal Assistance for Vietnamese Asylum Seekers (LAVAS), Thua Van Le, Em Van Vo, Thu Hoa Thi Dang, and Truc Hoa Thi Vo filed suit against the State Department and various officials, claiming individually and on behalf of the class of screened-out Vietnamese told to return to Vietnam that the State Department's policy change violated the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1151-1156, the regulations promulgated thereunder, the Administrative Procedure Act, and the United States Constitution. The four individual plaintiffs comprise two pairs, each consisting of one Vietnamese refugee and that refugee's United States sponsor. The District Court granted summary judgment for the State Department in April 1994. (For a more detailed summary of the factual background up to this point, see our prior opinion in *LAVAS*, 45 F.3d at 470-71.)

On appeal by LAVAS, we held in February 1995 that the State Department's refusal to process appellants' applications at the United States Consulate in Hong Kong violated the INA. *See id.* at 470-74. Judge Randolph dissented on the merits, but also on the grounds that we should have remanded the case to the District Court to determine whether the dispute had become moot because the alien appellants might have already obtained relief at the time of the decision. *See id.* at 474-76 (Randolph, J., dissenting). In March 1995, the State Department filed a petition for rehearing and suggestion for rehearing *in banc*,

claiming for the first time in the litigation that the case was mooted as to Thua Van Le and Thu Hoa Thi Dang on July 21, 1994, when Dang was found eligible for an immigration visa, and as to Em Van Vo and Truc Hoa Thi Vo on November 30, 1994, when Truc Hoa Thi Vo was preliminarily determined to be ineligible for an immigrant visa. The appellants concede that the individual claims of Thua Van Le and Thu Hoa Thi Dang have become moot, but claim that these individuals and LAVAS may remain as class representatives. They do contest the mootness of the Vos' individual claims.

In May 1995, because resolution of the mootness issue might require the evaluation of new evidence, we remanded the case to the District Court for a determination. On September 11, 1995, the District Court declared the case moot and issued a memorandum opinion, relying primarily on its view that the only claim for relief was that Truc Hoa Thi Vo's application be processed in Hong Kong instead of in Vietnam:

> The application of detained plaintiff Truc Hoa Thi Vo was . . . processed at the United States Consulate in Hong Kong and was denied on November 30, 1994. Ms. Vo has one year from the date of denial of her immigrant visa application to supply the Consulate with additional documentation to support her application, or her application will be canceled.
>
> Plaintiffs contend that the current status of Ms. Vo's application is such that her case cannot be moot, since the Consulate has not yet made a "final" determination to grant or deny her immigrant visa application, but has made only an

> "initial" determination to deny her application. Defendants argue that Ms. Vo has obtained the relief she sought—namely, that her immigrant visa application be processed by the United States Consulate in Hong Kong, rather than after a forced repatriation to Vietnam. The Court agrees with defendants. Ms. Vo has obtained the specific relief she sought and has had her application processed by the United States Consulate in Hong Kong. Plaintiffs are correct that the Consulate has not yet finally determined whether Ms. Vo's immigrant visa application will be granted or denied, but the relief Ms. Vo sought from this Court—the processing of her application in Hong Kong instead of Vietnam—has been achieved. (The Court has, of course, no power to review a final determination of the Consulate as to the merits of Ms. Vo's immigrant visa application.) Ms. Vo's claims, and those of her citizen-sponsor, Em Van Vo, are therefore moot.

Mem. Op. at 3-4. We subsequently ordered additional briefing on the issue of mootness, which issue we now consider as a prelude to ruling on the request for rehearing.

II. LEGAL ANALYSIS

Mootness

We are guided in our decision in this case by our decision in *City of New York v. Baker*, 878 F.2d 507 (D.C. Cir. 1989). In *Baker*, the plaintiffs challenged the State Department's refusal to grant a visa to former Italian Senator Nino Pasti so that he could participate in a political demonstration in the United States. The State Department refused to grant the visa on the grounds that it would prejudice this country's foreign policy interests. On appeal, the State Department argued that the case had become moot because it had decided that it would not deny any future visa application from Senator Pasti or other aliens on the challenged basis. We rejected that argument, however, in light of the fact that accepting it would mean that "the State Department would be free to reassert its earlier position, which the government has not renounced." *Id.* at 511. Importantly, we noted that "voluntary cessation of a challenged practice does not in and of itself moot a case when the party could renew it." *Id.* at 511-12.

A useful case from a sister circuit court is *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988). In *Allende*, the State Department had initially refused to grant a visa to Hortensia de Allende. By the time of the appeal, however, the State Department had granted her a visa, and therefore claimed that the case was moot. The First Circuit rejected the mootness claim, stressing the continuing nature of the basic controversy:

> [T]he validity of [the challenged policy] in general remains a live controversy. . . . [T]he government has stated that future visa applications by Mrs. Allende "presumably would be approved." The government has not, however, revised its interpretation of [the relevant statute]. The mere voluntary cessation of its challenged activity does not, in our opinion, moot the controversy.

Id. at 1115 n. 7.

Both of these cases stand for the proposition that the government cannot escape the pitfalls of litigation by simply giving in to a plaintiff's individual claim without renouncing the challenged policy, at least where there is a reasonable chance of the dispute arising again between the government and the same plaintiff. *Better Government Ass'n v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986), and *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988). Appellants argue (with good reason) that theirs is just such a case. To begin with, appellants did not simply request a "one shot, all or nothing opportunity to have a consular officer interview Ms. Vo in Hong Kong." At a minimum, they requested that Ms. Vo's application be completely and fully processed in Hong Kong, not merely subjected to an initial determination. The record reveals that the State Department has not yet fully afforded this relief to Ms. Vo. Her application has been considered, but it remains open until November 16, 1996, according to an affidavit recently added to the record. Because Ms. Vo is still "participat[ing] in the application process giving rise to this action . . . [it] is not moot." *Singh v. Ilchert*, 784 F. Supp. 759, 762 (N.D. Cal. 1992).

In any case, even if Ms. Vo's current application had expired by this time, she would presumably be free to file another application. If she did, her dispute with the State Department would remain essentially unchanged since, according to both parties, the State Department has returned to its former policy of refusing to process applications of Ms. Vo's sort in Hong Kong after December 1, 1994. The State Department, then, cannot show that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (citation and internal quotation marks omitted). In fact, the allegedly wrongful behavior—the refusal to process applications of this type at the United States Consulate in Hong Kong—is virtually certain to recur, and it will quite probably recur in the case of Ms. Vo should her current application be turned down. Where there is a reasonable probability that "the same complaining part[ies]" will "be subject[] to the same action again," a finding of mootness is inappropriate. *Mississippi River Transmission Corp. v. F.E.R.C.*, 759 F.2d 945, 952 n.9 (D.C. Cir. 1985) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). We accordingly hold that this case is not moot as to the individual claims of Mr. and Ms. Vo and reverse the District Court's judgment of mootness. We deny the State Department's petition for rehearing.[1] Our prior judgment and opinion on the merits of the State Department's policy stands, and we remand this case to the District Court for treatment consistent with both this and our prior opinion.

[1] A suggestion for rehearing *in banc* still pends before the full court.

Class Certification

On this appeal, LAVAS and the individual appellants also challenge the District Court's failure to grant their class certification motion under FED. R. CIV. P. 23. The District Court initially denied this motion as moot in April 1994 after granting summary judgment for the State Department on the individual claims which we subsequently reversed. On remand, the District Court again refused to grant the certification, holding that "because the named plaintiffs' claims have now become moot, no case or controversy exists on which to append a class of plaintiffs." Mem. Op. at 8 (Sept. 11, 1995). Because we hold today that this case is not moot with respect to Mr. and Ms. Vo, the basis for the District Court's holding on the class certification motion is no longer true, and we must necessarily vacate the District Court's refusal to grant the class certification motion. However, we do not find it necessary to reach the merits of the motion. We simply remand this issue for reconsideration in light of our holding that the case is not moot as to Mr. and Ms. Vo.[2]

[2] Subject to the full court's resolution of the *in banc* suggestion.

RANDOLPH, *Circuit Judge*, concurring in part and dissenting in part: I agree the case is not moot. LAVAS sought an order directing U.S. officials to "conduct the final processing" of the plaintiffs' visa applications in Hong Kong. Whatever "final processing" means, it has not yet occurred with respect to Truc Hoa Thi Vo. Her application was initially denied on November 30, 1994, several months before we issued our decision in *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469 (D.C. Cir. 1995). However, the consulate general's letter to her indicated that more processing in Hong Kong could occur, and an uncontested declaration filed with this court states that her application will remain alive at least until November 16, 1996.

Nonetheless, I would grant the petition for rehearing for reasons I have already given. *LAVAS*, 45 F.3d at 474-75 (dissenting opinion). *LAVAS* remains a barrier to full implementation of the international plan to end the "boat people" crisis. Since the time of our decision, the refugee problem has continued to fester. According to press reports, growing uncertainty over the position of the United States has contributed to rioting in the refugee camps, which has in turn slowed the process of repatriation. Philip Shenon, *Riots by Vietnamese Erode Plan to Send Them Home*, N.Y. TIMES, June 9, 1995, at A3. Under the international plan, all of the Vietnamese now in the Hong Kong camp were to be back in Vietnam by the end of 1995. *The Final Vietnam Refugees*, WASH. POST, Dec. 28, 1995, at A22. That deadline has now passed, and still no end is in sight. *Still a Long Battle Ahead to Clear Boatpeople Camps, Say Experts*, Agence France Presse, Jan. 16,

1996, *available in* LEXIS. In the meantime, further doubts have been raised about the majority's interpretation of the Immigration and Nationality Act. In a related case, now pending in this court (*Lisa Le v. Department of State*, No. 95-5425), the State Department contends that § 202(a)(1), 8 U.S.C. § 1152(a)(1), on which *LAVAS* rested, should not have been invoked because it governs only the issuance of visas, a matter not involved in this case, which deals instead with where visa applications must be processed. Venue determinations are, the State Department says, entrusted entirely to the Secretary of State by § 222(a), 8 U.S.C. § 1202(a), and are not subject to § 202(a)(1). Whatever the validity of this new argument, I remain convinced that none of the plaintiffs in this case were discriminated against on the basis of their nationality in violation of § 202(a)(1), that the majority decision is in error, and that the case should be reheard forthwith so that the United States can promptly bring itself into compliance with the international agreement this country reached with fifty other nations.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1995 USDC CV 94-0361

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, ET AL., APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., APPELLEES

[Filed: Feb. 12, 1996]

ORDER

BEFORE: EDWARDS, Chief Judge, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges

Appellees' Suggestion for Rehearing *In Banc*, the response, the reply and the supplemental briefs following remand have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular

active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams, Ginsburg, Henderson and Randolph would grant the suggestion.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1995

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, ET AL., APPELLANTS

v.

BUREAU OF CONSULAR AFFAIRS, ET AL.,
DEPARTMENT OF STATE, APPELLEES

[Filed: Feb. 21, 1996]

ORDER

BEFORE: EDWARDS, Chief Judge, SENTELLE and RANDOLPH, Circuit Judges

Upon consideration of appellees' Motion to Continue Stay of Mandate Pending Disposition of Suggestion for Rehearing *In Banc*, filed February 7, 1996, the response and reply, and of appellees' Motion to Stay Mandate to Permit the Government Time

Within Which to Seek a Writ of Certiorari From the Supreme Court, filed February 15, 1996, it is

ORDERED that the motion of February 15, 1996 is granted. The Clerk is directed to withhold issuance of the mandate through March 21, 1996. It is

FURTHER ORDERED that appellees' motion filed on February 7, 1996 is dismissed as moot.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5104

SEPTEMBER TERM, 1995 (94CV00361)

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; ET AL., APPELLANTS

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL.

[Filed: Mar. 14, 1996]

ORDER

BEFORE: EDWARDS, Chief Judge, SENTELLE and RANDOLPH,* Circuit Judges.

Upon consideration of the emergency motion to vacate judgment or, in the alternative, to stay the mandate, pending disposition of the *in banc* proceeding in *Lisa Le*, it is

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* Judge Randolph would have ordered a response to the motion.

ORDERED that the motion be denied.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Elizabeth V. Scott
Deputy Clerk/LD

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 95-989 SSH

LISA LE ET AL., PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Dec. 13, 1995]

ORDER

Before the Court for current resolution are plaintiffs' renewed motion for a preliminary injunction, defendants' response, and plaintiffs' reply. (The parties' briefing on the merits remains pending.) The Court is sensitive to the time that has passed since plaintiffs initially filed their motion for a preliminary injunction, although the Court notes that plaintiffs agreed to combine their initial preliminary injunction motion with briefing on the merits, and the parties' motions were not ripe until August 17, 1995.

This case is in an unusual procedural posture. The appeal from its predecessor case was decided in *LAVAS v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995), which dealt with issues identical to those

present in this case. Subsequent to the issuance of the opinion just cited, *LAVAS* was remanded to this Court, which concluded that that case was moot. *See* Memorandum Opinion in Civil Action No. 94-361, Sept. 11, 1995. That mootness determination, along with defendants' petition for rehearing *en banc*, remains under consideration by the Court of Appeals in *LAVAS*. Accordingly, this Court has hoped that further guidance would issue from the Court of Appeals prior to its resolution of the parties' dispositive motions.[1]

In retrospect, this hope was unrealistic, given the complexity and importance of the issues now before the Court of Appeals.[2] In addition, although defen-

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[1] The Court also placed great weight on defendants' representations, made in reliance upon commitments by the Hong Kong Government, that plaintiffs would not be repatriated before plaintiffs' claims could be litigated. Defendants initially assured plaintiffs that they would not be repatriated before October 1, 1995, after which concession plaintiffs agreed to combine their preliminary injunction motion with briefing on the merits. Defendants subsequently extended their guarantee to December 31, 1995, and, most recently, to April 1, 1996. A preliminary injunction typically is designed to maintain the status quo until resolution of a case on its merits can be had; the defendants' unilateral offer to maintain the status quo, in the Court's view, obviated the need to proceed expeditiously with respect to plaintiffs' preliminary injunction motion. The Court expresses its appreciation to both the United States and Hong Kong Governments for their cooperation in avoiding having the Court face unduly onerous time constraints.

[2] Those issues have been dealt with well and thoroughly by both sides in this case and in *LAVAS*. They involve tens of thousands of Southeast Asian migrants, each of whom has his or her own unique factual characteristics and hence must be dealt with on an individual basis. The great majority of them have

dants have given plaintiffs assurances that plaintiffs will not be repatriated before April 1, 1996, the Court is reluctant to continue to reserve ruling on plaintiffs' preliminary injunction motion until the Court of Appeals reaches a final resolution of *LAVAS*. In the meantime, although defendants correctly note that no mandate has issued in *LAVAS*, the conclusion is inescapable that, at least at this time, it does represent controlling law. Accordingly, it hereby is

ORDERED, that plaintiffs' renewed motion for a preliminary injunction is granted. Defendants shall take steps to process plaintiffs' visa applications in accordance with their practice as it existed prior to December 1, 1994. It hereby further is

ORDERED, that defendants shall take all possible steps to ensure that plaintiffs are not repatriated prior to a decision on the merits of their action, or

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fled communism in Vietnam, and the Court is not without sympathy for their plight. Efforts to deal with them have involved agreements among more than 50 countries, and the principles at issue far transcend the small number of parties to this case.

Of course, as would be expected whenever any trial court ruling is reversed, the undersigned respectfully believes that the dissenting judge's position in *LAVAS* is the correct one. Basically, the *LAVAS* decision is predicated on the idea that the government's manner of dealing with massive numbers of migrants in Hong Kong constitutes illegal discrimination against Vietnamese. The ultimate decision now rests in the Court of Appeals, but the *LAVAS* opinion calls to mind the observation made by the late Justice Frankfurter: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

prior to their processing, whichever first occurs. It hereby further is

ORDERED, that a copy of this Order shall be transmitted to the Clerk of the United States Court of Appeals for the District of Columbia Circuit for association with its Case No. 95-5401.[3]

SO ORDERED.

/s/ *Stanley S. Harris*
STANLEY S. HARRIS
United States District Judge

Date: DEC 13 1995

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[3] Given all of the circumstances, although the Court does not believe that the prerequisites for the extraordinary remedy of mandamus are present, the Court sees no point in having the Court of Appeals expend its resources in resolving the delicate mandamus question which is presented. The blessing, however, is a mixed one: *LAVAS* remains pending, and the issuance of this preliminary injunction is appealable.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5425

SEPTEMBER TERM, 1995 95CV00989

LISA LE, ET AL.,

v.

DEPARTMENT OF STATE, BUREAU
OF CONSULAR AFFAIRS, ET AL., APPELLANTS

[Filed: Jan. 2, 1996]

ORDER

BEFORE: SILBERMAN, SENTELLE,* and RANDOLPH,
Circuit Judges

Upon consideration of the emergency motion for stay pending appeal and for an expedited appeal, it is

ORDERED, on the court's own motion, that the district court's order filed December 13, 1995 be stayed pending this court's disposition of the petition for rehearing in *Legal Assistance for Vietnamese*

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* Circuit Judge Sentelle dissents.

Asylum Seekers, et al. v. Department of State, Bureau of Consular Affairs, et al., No. 94-5104. This administrative stay should not be construed in any way as a ruling on the merits of the motion for stay pending appeal and for an expedited appeal. *See D.C. Circuit Handbook of Practice and Internal Procedures* 68 (1994).

Per Curiam

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5425

SEPTEMBER TERM, 1995 95CV00989

LISA LE, ET AL.,

v.

DEPARTMENT OF STATE, BUREAU
OF CONSULAR AFFAIRS, ET AL., APPELLANTS

[Filed: Feb. 20, 1996]

ORDER

BEFORE: WALD, WILLIAMS and ROGERS, Circuit Judges

Upon consideration of the emergency motion for stay pending appeal and for an expedited appeal, it is

ORDERED that the emergency motion be denied. In view of this court's decisions in *Legal Assistance for Vietnamese Asylum Seekers, et al. v. Department of State, et al.* (*LAVAS*), 45 F.3d 469 (D.C. Cir. 1995), 1996 WL 39531 (Feb. 2, 1996) (on petition for rehearing), *reh'g en banc denied* (Feb. 12, 1996), appellants have not demonstrated the requisite likeli-

hood of success on the merits to warrant issuance of a stay or expedition of the appeal. *See Washington Metropolitan Area Transit Authority Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 68-69 (1994). It is

FURTHER ORDERED, on the court's own motion, that appellants show cause within thirty (30) days of the date of this order why the district court's order filed December 13, 1995 (granting a preliminary injunction), should not be summarily affirmed in light of this court's decisions in *LAVAS*. The response to the order to show cause shall not exceed 20 pages. Failure to comply with this order will result in dismissal of the appeal for lack of prosecution. *See* D.C. Cir. Rule 38.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Elizabeth V. Scott
Deputy Clerk/LD

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5425

SEPTEMBER TERM, 1995 95CV00989

LISA LE, ET AL.,

V.

DEPARTMENT OF STATE, BUREAU
OF CONSULAR AFFAIRS, ET AL., APPELLANTS

[Filed: Feb. 20, 1996]

ORDER

Upon consideration of the motion for clarification and to continue stay, and the opposition thereto, it is

ORDERED that the motion for clarification be dismissed as moot. *See Legal Assistance for Vietnamese Asylum Seekers, et al. v. Department of State, et al.*, No. 94-5104 (Feb. 2, 1996) (on petition for rehearing) and (Feb. 12, 1996) (on suggestion for rehearing en banc).

FOR THE COURT:
Mark J. Langer Clerk

By: /s/ Elizabeth V. Scott
Deputy Clerk/LD

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 95-989 SSH

LISA LE, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Mar. 2, 1996]

MEMORANDUM OPINION

Before the Court are the following motions: plaintiffs' motion to join additional plaintiffs and motion for a preliminary injunction, defendants' opposition thereto, and plaintiffs' reply; plaintiffs' motion for summary judgment; and defendants' motion to dismiss or, alternatively, cross-motion for summary judgment, plaintiffs' reply and opposition to defendants' cross-motion, defendants' reply, and plaintiffs' surreply.

The history of this case has previously been set forth in the opinion of June 29, 1995, issued by another judge of this court who had the case temporarily, and in the opinion issued by the United States Court of Appeals for the District of Columbia Circuit in *Legal*

Assistance for Vietnamese Asylum Seekers ("LAVAS") v. Department of State, 45 F.3d 469 (D.C. Cir. 1995), a separate case which nonetheless is identical to this action in all relevant respects. Plaintiffs filed suit and moved for a preliminary injunction on May 25, 1995, and plaintiffs' motion for a preliminary injunction was granted on June 29, 1995. *Vo v. Department of State*, 891 F. Supp. 650 (D.D.C. 1995). On July 11, 1995, plaintiffs filed an amended complaint, adding 18 additional plaintiffs, and moved for a second preliminary injunction. (Plaintiffs Vo Van Chau and Le Thi Thanh Xuan's claims were later rendered moot when the Department of State processed and granted Le's visa application on September 14, 1995.) Plaintiffs' second motion for a preliminary injunction was granted on December 13, 1995. *Le v. Department of State*, Civil Action No. 95-989 (D.D.C. Dec. 13, 1995).

Plaintiffs' Motion To Join Additional Parties

On December 22, 1995, plaintiffs moved, pursuant to Fed. R. Civ. P. 21, to join 32 more individuals as plaintiffs. Plaintiffs moved at the same time for a third preliminary injunction and for summary judgment as to those additional parties. As with the 18 current plaintiffs, the 32 individuals are really 16 pairs: 16 are petitioner-sponsors living in the United States[1] who petitioned the INS for immigrant visas for Vietnamese nationals currently detained in Hong Kong, and 16 are the sponsored Vietnamese nationals.

[1] Fourteen of the 16 stateside sponsors are United States citizens, one is a permanent resident of the United States, and one is a religious organization.

Plaintiffs' motion to join additional parties requires a brief (and, by necessity, oversimplified) explanation of the process by which eligible detained nationals and their sponsors secure the nationals' entry into the United States. Before a detained Vietnamese national may apply to the United States Consulate General in Hong Kong for an immigrant visa ("IV"), his or her sponsor in the United States must petition for an IV from the Immigration and Naturalization Service ("INS"), under one of several provisions (the relevant provisions in this case relate to spouses, children, and religious immigrant workers). *See* 8 U.S.C. §§ 1151-1156 (Supp. 1995). The sponsor's IV petition, if approved by the INS, must also be "current"—that is, the detained Vietnamese applicant would not have to wait for a visa number if his or her subsequent IV application to the United States Consulate General were granted. *See* Aff. of Wayne S. Leininger, Defs.' Opp. to Pls. Mot. for Prelim. Inj., June 15, 1995.

When an IV petition is approved by the INS, it is submitted to the National Visa Center ("NVC") for processing. The NVC may send the approved IV petition directly to a specified consular post (*i.e.*, the post in Hong Kong) after entering it in its database, or the NVC may store the petition until the Visa Services Directorate (the "VO") determines that the petition may be processed by a consular post. Defs.' Corrected Opp., Aff. of Brian McNamara, para. 1.

When a stateside sponsor's IV petition is approved by the INS and is current, the detained applicant has one more hurdle to surmount: he or she must apply for an IV to the United States Consulate General, submit certain supporting documents, and, when his or her documentation is complete, submit to an

interview at the Consulate. If the IV application is granted, the applicant is allowed entry into the United States. This case and *LAVAS* are concerned only with this final stage of the process—the detainee's application to the United States Consulate General for an IV, once the INS has approved the sponsor's IV petition and the petition is deemed current.[2] Accordingly, the Court will consider accepting as plaintiffs only those individuals and sponsors whose IV petitions are current and approved by the INS, and who await only processing and decision by the United States Consulate General on their IV applications.[3]

Defendants state in their opposition and their corrected opposition to plaintiffs' motion to join additional parties that 13 of the 16 sponsors' IV petitions are current and have been approved (and, therefore, that 13 of the 16 detained plaintiffs are eligible for an interview with the Consulate, if they are document-ready). Defs.' Opp. to Pls.' Mot. to Join Add'l Parties, Aff. of Martha Sardinas (Jan. 12, 1996) (Sardinas Aff. I), paras. 2-3; Defs.' Corrected Opp., Aff. of Martha Sardinas (Jan. 24, 1996) (Sardinas Aff. II),

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[2] Any suggestion that the Court reach further back, tamper with INS policy, and order a particular IV petition approved would be, "to say the least, [as] disquieting" as suggesting that the Court tamper with foreign policy and order applications processed in a certain location. *See LAVAS*, 45 F.3d at 475 (Randolph, J., dissenting).

[3] The Court expresses no opinion on the feasibility or desirability of certifying a class of plaintiffs, this issue having been remanded to the Court for consideration in *LAVAS*. *See LAVAS v. Department of State*, No. 94-5104 (D.C. Cir. Feb. 2, 1996) (reversing the Court's mootness determination and remanding for consideration of class certification issue).

paras. 3-6; Defs.' Opp., Aff. of Bernard J. Alter (Jan. 12, 1996), para. 2a; Defs.' Corrected Opp., Aff. of Bernard J. Alter (Jan. 24, 1996), para. 2a. Defendants submit that they lack documentation on three detainees; Cao Thi My Linh (sponsored by Jon Van Phan, a.k.a. Phan Thang Van), Nguyen Thi Thanh (sponsored by Nguyen Ngoc Huang) and Nguyen Van Ton (sponsored by Nguyen Van Dien).

Plaintiffs have submitted documentation showing that the IV petition of Jon Van Phan has been approved by the INS. Pls.' Reply, Ex. 1. Plaintiffs also have submitted documentation showing that Phan became a United States citizen on September 13, 1995. According to defendants' submissions, Phan's citizenship, and the INS's prior approval of his IV petition, renders the petition current. Sardinas Aff. II, para. 3. Phan's spouse, Cao Thi My Linh, is accordingly eligible (if document-ready) for an IV interview at the USCG in Hong Kong, upon submission of the approved petition to the USCG in Hong Kong by the NVC.[4]

Nguyen Ngoc Huang is also a United States citizen. Pls.' Mot. to Join Add'l Parties at 3, para. 11.

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[4] The Court recognizes that, in some circumstances, the NVC may not immediately forward an approved IV petition to the appropriate consular post for processing. *See* McNamara Aff., para. 1. Defendants should not interpret this Memorandum Opinion to mean that the NVC must hasten or abort its processing of approved IV petitions, but only that, once the NVC has determined that an approved IV petition for a Vietnamese national detained in Hong Kong should be forwarded, the approved petition should be sent to the USCG in Hong Kong, and not the Orderly Departure Program ("ODP") in Bangkok. *See* Sardinas Aff. I, paras. 1-2 (noting that screened-out immigrants' approval IV petitions are currently sent to the ODP in Bangkok).

The IV petition of Nguyen Ngoc Huang was approved by the INS on October 25, 1995. Pls.' Reply, Supp. Decl. of Mark Zuckerman, para. 4. His petition, too, is therefore approved and current, and his spouse, Nguyan Thi Thanh, is eligible (if document-ready) for an IV interview at the USCG in Hong Kong, upon submission of the approved petition to the USCG by the NVC. *See* Sardinas Aff. II, para. 3.

Remaining is detainee Nguyen Van Ton, sponsored by his father, Nguyen Van Dien, who is a United States citizen. Despite plaintiffs' explicit representation to the contrary, *see* Pls.' Reply at 2, Nguyan Van Dien's IV petition has not been approved by the INS; it has only been reviewed by the INS. Pls.' Reply, Ex. 3. According to that document, it takes "300 to 330 days" from the date of receipt of an IV petition for the INS to process the case. *Id.* The Court has not other indication that the INS has approved Nguyen Van Dien's IV petition on behalf of Nguyen Van Ton, and these two individuals therefore are not proper plaintiffs in this action. Accordingly, plaintiffs' motion to join additional plaintiffs is granted as to all but two: Nguyen Van Dien and Nguyen Van Ton.

Plaintiffs' Motion for Summary Judgment

On February 13, 1996, the Court of Appeals (by a vote of 7-4) denied defendants' suggestion of rehearing *en banc* in *LAVAS*, No. 95-5104 (D.C. Cir. Feb. 13, 1996). This case is, in all relevant respects, identical to *LAVAS*. *See LAVAS v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995); *Vo v. Department of State*, 891 F. Supp. 650, 652 (D.D.C. 1995) (noting that this action is "closely related" to *LAVAS*). While defendants are correct that the doctrine of nonmutual

offensive collateral estoppel may not be asserted against the federal government, *see United States v. Mendoza*, 464 U.S. 154 (1984), the government cannot evade, just as this Court may not fail to follow, precedent from its own court of appeals in a case presenting the same facts and the same issues of law. *See Stormont-Vail Regional Medical Ctr. v. Bowen*, 645 F. Supp. 1182, 1192 (D.D.C. 1986). Accordingly, plaintiffs' motion for summary judgment is granted.[5]

An appropriate Order accompanies this Opinion.

/s/ STANLEY S. HARRIS
STANLEY S. HARRIS
United States District Judge

Date: MAR 1 1996

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[5] Findings of fact and conclusions of law are unnecessary in ruling on a summary judgment motion. Fed. R. Civ. P. 52(a); *see Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2511 (1986).

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 95-989 SSH

LISA LE, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., DEFENDANTS

[Filed: Mar. 2, 1996]

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it hereby is

ORDERED, that plaintiffs' motion to join additional party plaintiffs is granted as to the following individuals: Bui Thi Lan, Cao Thi My Linh, Huynh Vinh Nhan, Le Thi Kim Xuyen, Le Thi Tham, Lieu Hue Tuong, Ngo Thi Ka, Nguyen Thi Bich Thuy, Nguyen Thi Quynh, Nguyen Thi Thanh, Nguyen Thi Van, Pham Thi Nhiem, Pham Van Ngoan, Tang Mau Phong, Vo Thi My Linh, Pham Ngoc Tuan, Jon Van Phan, Cheung On Su, Bui Ngoc Vung, Truong Dinh Phuong, Shirley Kiu Ho, Diep Quoc Binh, John Ha Pham, Truong Cong Thanh, Nguyen Ngoc Hoang, Tran Dinh Tien, Nguyen Phu Duc, the Vietnamese

Catholic Ministry, Lay Chong Nhi, and Nguyen Van Hai. The complaint is deemed amended to include those individuals as plaintiffs. It hereby further is

ORDERED, that plaintiffs' motion for summary judgment is granted. It hereby further is

ORDERED, that defendants are permanently enjoined from implementing their decision to decline processing of plaintiff detainees' immigrant visa applications at the United States Consulate in Hong Kong. It hereby further is

ORDERED, that defendants shall take all necessary and proper steps to process plaintiff detainees' immigrant visa applications in accordance with their practice as it existed prior to December 1, 1994.

SO ORDERED.

/s/ STANLEY S. HARRIS
STANLEY S. HARRIS
United States District Judge

Date: MAR 1 1996

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5425

LISA LE ET AL., APPELLEES,

v.

BUREAU OF CONSULAR AFFAIRS, ET AL.,
U.S. DEPARTMENT OF STATE, APPELLANTS

[Filed: Mar. 11, 1996]

ORDER

BEFORE EDWARDS, Chief Judge, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges.

Appellants' Petition for Initial Hearing *in banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the petition. Accordingly, it is

ORDERED, by the court *in banc*, that this matter will be considered and decided by the court sitting *in banc*.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By: /s/Robert H. Bonner

Robert A. Bonner
Deputy Clerk